Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GAYLORD CONTAINER CORP., GEORGIA-PACIFIC CORP., INTERNATIONAL PAPER CO., JEFFERSON SMURFIT CORP., PACKAGING CORPORATION OF AMERICA, INC., SMURFIT-STONE CONTAINER CORP., STONE CONTAINER CORP., TEMPLE-INLAND, INC., TENNECO, INC., TENNECO PACKAGING, INC., UNION CAMP CORP., AND WEYERHAEUSER CO.,

Petitioners,

v.

GARRETT PAPER, INC., GENERAL REFRACTORIES CO., ALBERT I. HALPER CORRUGATED BOX CO., LOCAL BAKING PRODUCTS, INC., AND OAK VALLEY FARMS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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January 14, 2003

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred by allowing, contrary to the Fourth, Fifth, and Ninth Circuits, class certification for antitrust claims that involve an element—individual injury—that cannot be established on a classwide basis.

2. Whether the Third Circuit erred by allowing, contrary to the Fourth Circuit, class certification for claims that would be time-barred but for a doctrine—fraudulent concealment—that cannot be established on a classwide basis.

RULE 29.6 STATEMENT

Gaylord Container Corp. is wholly owned by Temple-Inland, Inc.

Georgia-Pacific Corp. has no parent corporation, and no publicly held company owns 10% or more of its stock.

International Paper Co. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Jefferson Smurfit Corp. is wholly owned by Smurfit-Stone Container Corp.

Packaging Corporation of America, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Smurfit-Stone Container Corp. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Stone Container Corp. is wholly owned by Smurfit-Stone Container Corp.

Temple-Inland, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Tenneco, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Tenneco Packaging, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Union Camp Corp. has been merged into International Paper Co.

Weyerhaeuser Co. has no parent corporation. Capital Research and Management Company, a publicly held company, owns 10% or more of its stock.

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INTRODUCTION

This case is to antitrust class actions what *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), was to mass tort class actions. Respondents (five small companies) seek to bring treble-damages antitrust claims against much of the American paper industry on behalf of all entities (including some of the largest corporations in the world) that purchased corrugated boxes and sheets from petitioners in literally millions of individual transactions over a two-year period in the early 1990s. Brushing aside precedent from other federal courts, the Third Circuit (speaking through Senior Judge Aldisert) allowed respondents to pursue such claims in a class action, even though, for two basic reasons, respondents cannot possibly establish petitioners' liability on a classwide basis.

First, respondents cannot establish that each and every member of their putative classes was injured by the alleged antitrust conspiracy. A plaintiff must prove injury in order to establish antitrust liability. The Third Circuit, however, held that the requirement of injury presented no barrier to class certification, relying on respondents' assurances that injury could be proven on a classwide basis at trial. That holding not only is wrong, but conflicts with holdings from the Fourth, Fifth, and Ninth Circuits.

Second, respondents cannot establish that each and every member of their putative classes has a timely claim. Respondents filed this lawsuit after the expiration of the relevant four-year statute of limitations on many of their claims, and invoked the doctrine of fraudulent concealment to avoid the time bar. That doctrine, however, requires each plaintiff to establish that he or she did not discover the basis for his or her claim within the limitations period notwithstanding his or her own due diligence. The Third Circuit held that this inherently individualized inquiry presented no barrier to class certification. That holding not only is wrong, but conflicts with the Fourth Circuit's contrary holding in *Broussard v. Meineke*

Discount Muffler Shops, Inc., 155 F.3d 331 (1998) (Wilkinson, C.J.). Indeed, in its opinion, the Third Circuit expressly recognized the existence of such a conflict.

Both issues go to the very core of the class-action device. By authorizing respondents to pursue these claims on behalf of classes including entities that could not possibly establish liability against petitioners, the Third Circuit violated not only the command of the Rules Enabling Act that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), but also constitutional principles of due process, *see, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 44-46 (1940). As a practical matter, the Third Circuit thereby handed the antitrust plaintiffs' bar a powerful tool to exact unwarranted settlements from defendants in industry-wide treble-damages litigation. *Cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, J.) (discussing settlement pressures on defendants in class actions). This Court should not tolerate such abuse of the class-action device. If this judgment stands, an entire industry may potentially face a nationwide damages action that simply would not be countenanced in other circuits. This Court's review is needed to ensure uniformity in this vital arena of federal law.

OPINIONS BELOW

The Third Circuit's opinion is reported at 305 F.3d 145 and reprinted in the Appendix ("App.") at 3a-34a. The unreported order denying the petition for panel rehearing and rehearing *en banc* is reprinted at App. 1a-2a. The unreported order granting leave to appeal from the district court's decision to grant class certification is reprinted at App. 35a-36a. The district court's opinion certifying the classes is reported at 203 F.R.D. 197 and reprinted at App. 37a-89a.

JURISDICTION

The Third Circuit entered judgment on September 5, 2002. Petitioners timely filed a petition for panel rehearing and rehearing *en banc*, which was denied on October 16, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

In relevant part, Rule 23 of the Federal Rules of Civil Procedure states as follows:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition * * *
>
> > (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the

> controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
>
> * * *
>
> **(f) Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

STATEMENT OF THE CASE

A. Background

This is a case about linerboard, a heavyweight paper that can be glued to the outer surfaces of fluted cardboard to make, among other things, corrugated boxes and sheets. *See* App. 4a n.1. Petitioners are vertically integrated manufacturers and sellers of linerboard and corrugated boxes and sheets. *See id.* Respondents are small purchasers of corrugated boxes and sheets, *not* of linerboard. *See id.* at 5a-6a.

This case involves allegations that petitioners conspired to reduce the output of linerboard, and thus indirectly to raise the prices of corrugated boxes and sheets made in part of linerboard. In 1998, after a lengthy industry-wide investigation, the Federal Trade Commission (FTC) filed an administrative complaint solely against petitioner Stone Container Corp., alleging that Stone had engaged in unilateral conduct in violation of section 5 of the FTC Act. *See id.* at 38a. Notably, the FTC alleged in its complaint only that Stone had attempted

to reduce its own linerboard inventories and *invited* its competitors to join in a conspiracy to raise linerboard prices; the FTC did not allege that any other manufacturer had *accepted* Stone's invitation, or that any conspiracy actually *existed*. *See id.* Stone eventually entered into a consent decree with the FTC, under which the company made no admission of liability for its alleged unilateral misconduct under section 5. *See id.*

B. The District Court Proceedings

Shortly after the FTC filed its complaint against Stone, three purchasers of corrugated sheets, including two of the respondents, filed separate federal class actions in the Northern District of Illinois. *See id.* at 38a-39a. These complaints named only Stone as a defendant, but alleged that Stone and unnamed entities had engaged in an antitrust conspiracy to raise linerboard prices. *See id.* at 39a. The complaints alleged that this conspiracy lasted from June 1993 until at least March 1995. *See, e.g.*, C.A. App. 112. Around the same time, four purchasers of corrugated boxes, including the other three respondents, filed separate federal class actions in the Eastern District of Pennsylvania, raising similar claims and again naming only Stone as a defendant. *See* App. 39a. Those complaints alleged that the conspiracy began in October 1993 and ended in November 1995. *See, e.g.*, C.A. App. 120.

In late 1998, Stone moved to dismiss the complaints filed by the sheet purchasers. *See* App. 39a. On January 8, 1999, the Illinois district court denied that motion. *See General Refractories Co. v. Stone Container Corp.*, No. 98-C-3543, 1999 WL 14498 (N.D. Ill. Jan. 8, 1999). On February 12, 1999, the Judicial Panel on Multidistrict Litigation transferred the sheet purchasers' actions from the Northern District of Illinois to the Eastern District of Pennsylvania, where the complaints filed by the box purchasers were still pending. *See* App. 40a.

On May 14, 1999, the box plaintiffs filed a new, consolidated class action complaint, which for the first time named twelve defendants in addition to Stone, including all of the other petitioners (or their corporate predecessors). *See id.* That amended complaint alleged that these additional defendants had in fact accepted Stone's invitation to reduce linerboard output and thereby raise linerboard prices, and thus had engaged in a conspiracy in violation of the Sherman Act. *See id.* Four days later, the sheet plaintiffs also filed a new, consolidated class action complaint, naming all of the petitioners (or their corporate predecessors) except Stone and Tenneco Inc., and making similar allegations. *See id.*

On September 1, 1999, defendants moved to dismiss the new consolidated complaints on a number of substantive grounds. *See id.* at 41a. On October 4, 2000, the district court denied the motions to dismiss. *See In re Linerboard Antitrust Litig.*, Civ. No. 98-5055, 2000 WL 1475559 (E.D. Pa. Oct. 4, 2000).

Both the box plaintiffs and the sheet plaintiffs then moved for class certification. *See* App. 41a-42a. The two groups of plaintiffs sought certification of essentially identical classes, comprising all entities nationwide that purchased corrugated boxes or sheets from the defendants between October 1, 1993, and November 30, 1995, *see id.*—classes that included not only small companies such as respondents, but also some of the largest corporations in the world.

In opposing class certification, petitioners made various arguments, two of which are germane here. First, petitioners contended that respondents could not establish liability on a classwide basis because the fact of injury, an essential element of antitrust liability, required an individualized inquiry. Second, petitioners contended that respondents could not establish the timeliness of their claims on a classwide basis in light of their reliance on the inherently individualized doctrine of fraudulent concealment.

The district court, however, rejected both of these arguments, and certified the following two classes, *sua sponte* modifying the proposed classes to exclude some purchasers that were indisputably not injured because their contractual prices for corrugated boxes and sheets were not linked to the price of linerboard:

> **Sheet Class**. All individuals and entities which purchased corrugated sheets in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals or entities which purchased corrugated sheets pursuant to contracts in which the purchase price was not tied to the price of linerboard.
>
> **Box Class**. All individuals and entities which purchased corrugated containers in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals and entities which purchased corrugated containers pursuant to contracts in which the purchase price was not tied to the price of linerboard or containerboard.

Id. at 88a-89a.

C. The Court Of Appeals Proceedings

Petitioners then applied for an interlocutory appeal of the class certification order pursuant to Fed. R. Civ. P. 23(f). A panel of the Third Circuit (Mansmann, Alito, and McKee, JJ.) granted the application. *See id.* at 35a-36a.

A different panel of the Third Circuit (Aldisert, S.J., McKee, and Fuentes, JJ.), however, affirmed the class certification order. *See id.* at 3a-34a. On the issue of fact of injury, the court accepted respondents' assurances that they could establish injury on a classwide basis at trial. *See id.* at 14a-18a. The court noted that plaintiffs' experts had concluded that the alleged conspiracy would have injured all putative class members, and added that the experts' conclusion was "significant because it was supported by charts and studies." *Id.* at 15a. The court noted that one of plaintiffs' experts had determined that the price of corrugated boxes and sheets was closely *correlated* with the price of linerboard, and had relied on that determination in concluding that the conspiracy to reduce linerboard output necessarily *caused* purchasers of corrugated boxes and sheets to pay higher prices. *See id.* And the court agreed with the district court that plaintiffs need not identify a particular econometric model for demonstrating fact of injury (or proving damages) on a classwide basis at the class-certification stage. *See id.* at 18a.

On the issue of fraudulent concealment, the Third Circuit held that class certification was appropriate notwithstanding the need for respondents to establish certain elements on an individualized basis. The court noted that "[t]he cumulative experience of the judiciary has not been uniform" on this issue, *id.* at 28a & n.12, and expressly acknowledged a circuit split between the First and Fourth Circuits, *see id.* at 31a-32a (citing *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), and *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998)). The Third Circuit cast its lot with the First Circuit, asserting that "common issues of concealment predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did." *Id.* at 32a (internal quotation omitted). According to the court, "[i]t is the fact of *concealment* that is the polestar in an analysis of

fraudulent concealment." *Id.* at 32a-33a.

The Third Circuit denied panel rehearing and rehearing *en banc*. *See id.* at 1a-2a. This petition follows.

REASON FOR GRANTING THE WRIT

THE THIRD CIRCUIT ERRED, AND DEEPENED CIRCUIT CONFLICTS, BY AFFIRMING CLASS CERTIFICATION HERE.

This case presents two related questions on which the federal courts of appeals are divided: (1) whether the fact of individual injury can be established on a classwide basis in antitrust actions, and (2) whether fraudulent concealment can be established on a classwide basis in actions in which that doctrine is necessary to revive otherwise time-barred claims. Both questions directly implicate the underlying purpose of the class action mechanism, which was "designed as an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) (emphasis added; internal quotation omitted). If the Third Circuit's decision is allowed to stand, and representative plaintiffs are allowed to litigate on behalf of classes even where, as here, liability cannot be established on a classwide basis, the "exception" will swallow the rule. Allowing inherently individualized issues to be litigated on a classwide basis violates not only the procedural requirements of Rule 23—namely, the overlapping requirements of commonality, typicality, and adequacy of representation under Rule 23(a), and of predominance and superiority under Rule 23(b)(3)—but also the underlying substantive commandments of the Rules Enabling Act and the Due Process Clause. To ensure fidelity to these requirements, and to resolve circuit conflicts over the application of Rule 23 in this context, *certiorari* is warranted on both questions.

A. The Third Circuit Erred, And Deepened A Circuit Conflict, By Holding That The Fact Of Individual Injury In Antitrust Cases Can Be Established On A Classwide Basis.

Certiorari is warranted here because the Third Circuit erred, and deepened a circuit split, on the fundamental issue whether an inherently individualized element of antitrust liability—fact of injury—precludes class certification. The Fourth, Fifth, and Ninth Circuits have held that it does; the Second and now the Third Circuits, in contrast, have held that it does not.

The analytical framework for a private antitrust claim under the Clayton Act is well-established: to establish liability, the plaintiff must prove (1) a violation of the antitrust laws, and (2) individual injury resulting from that violation. *See* 15 U.S.C. § 15a; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). The fact of individual injury, in other words, is a *liability* issue, not simply a *damages* issue. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001), *cert. denied sub nom. Visa U.S.A. Inc. v. Wal-Mart Stores, Inc.*, 122 S. Ct. 2382 (2002); *American Bearing Co. v. Litton Indus., Inc.*, 729 F.2d 943, 948 (3d Cir. 1984); *Windham v. American Brands, Inc.*, 565 F.2d 59, 65 (4th Cir. 1977) (*en banc*).[1]

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[1] It is true that *whether* a particular plaintiff has suffered an injury (that is, the fact of injury) is closely related to *how much* the plaintiff was in fact injured (that is, the amount of damages). This Court, however, has not only recognized that these are discrete inquiries, but also expressly stated that the standard of proof for the fact of injury is higher than that for the amount of damages. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *see generally* Philip Areeda, Comment, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1128 (1976) (noting that courts "insist upon a greater degree of proof of the fact

(continued...)

In *Windham*, the *en banc* Fourth Circuit held that fact of injury is an individual question that precludes class certification. The court emphasized that "[w]hile [an antitrust] case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are *always* strictly individualized." *Id.* at 66 (emphasis added). Notably, the court upheld the district court's conclusion that individual issues predominated even though at least some of the plaintiffs were bringing claims that defendants *directly fixed* the price of the product plaintiffs had purchased, *see id.* at 64, 67—claims that do not present nearly the same individualized causation difficulties as the claims at issue here, where plaintiffs purchased *different* products (corrugated boxes and sheets) from the one as to which a reduction in output was alleged (linerboard). The Fourth Circuit reasoned that "[t]he gravamen of the complaint is not the conspiracy; the crux of the action is injury, individual injury." *Id.* at 66. It therefore agreed with the district court that "the complexity of [plaintiffs'] claims as they would relate to injury and damages" and "the highly individualized character the proof of injury and damges would assume" precluded certification. *Id.*

The Fifth Circuit agrees. In *Shumate & Co. v. National Association of Securities Dealers, Inc.*, 509 F.2d 147 (1975), the Fifth Circuit considered a class action brought by a securities dealer against various stock exchanges and individuals, alleging that the defendants had conspired to exclude securities from the NASDAQ system and to ignore securities once they were included in that system, *see id.* at 149. The court upheld the district court's conclusion that class certification was inappropriate. *See id.* at 155. The court distinguished that case from "one where liability can be shown

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[1] (...continued)
of injury than would suffice for proof of the quantum of damage").

as to all class members, with only the amount of damage to be determined as to each." *Id.* Instead, it reasoned that, in an antitrust case, "the proof of injury to business or property of each class member is critical for the determination of defendants' liability to any individual." *Id.*

In *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (1978), a prominent case in class action jurisprudence, the Fifth Circuit expounded on its reasoning in *Shumate*. In *Blue Bird*, the State of Alabama brought a class action on behalf of all governmental entities in the United States that purchased school bus bodies against manufacturers of those bodies; Alabama, like the plaintiffs in *Windham*, brought antitrust claims alleging that defendants had, *inter alia*, directly fixed the price of the product plaintiffs had purchased. *See id.* at 311. After a lengthy discussion of the Fourth Circuit's decision in *Windham* and its own earlier decision in *Shumate*, the Fifth Circuit reversed the district court's decision to certify a nationwide class and remanded for further proceedings. *See id.* at 326-27, 330. The court reasoned that "the fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief," and added that "'impact' is a question unique to each particular plaintiff and one that must be proved with certainty." *Id.* at 327. Unsurprisingly, the Fourth Circuit's decision in *Windham* and the Fifth Circuit's decision in *Blue Bird* have frequently been cited in tandem by class-action defendants for the proposition that individual issues predominate over common issues even in "traditional" price-fixing cases. *See, e.g., In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 265 (D.D.C. 2002); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 308 (E.D. Mich. 2001); *Paper Sys. Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601,

613-14, 615 (E.D. Wis. 2000).[2]

In like manner, the Ninth Circuit has also forbidden class certification under these circumstances. In *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), the court considered allegations of a nationwide conspiracy among hotel chains to increase room telephone charges, *see id.* at 88. The court noted that fact of injury required individualized analysis because each class member would have to prove that he patronized a hotel while the surcharge was in effect and that he absorbed the cost of the surcharge. *See id.* The court concluded that "this suit raises far too many individual questions to qualify for class action treatment." *Id.* at 89.

The Second Circuit, by contrast, has taken the opposite approach. In *In re Master Key Antitrust Litigation*, 528 F.2d 5 (2d Cir. 1975), the court considered a class action by building owners alleging that the manufacturers of so-called "builders' hardware" had conspired to reduce competition and raise prices, *see id.* at 7. Although the court ultimately dismissed defendants' appeal from the district court's decision to certify the class, it nevertheless addressed the merits of defendants' claims in determining whether it had jurisdiction to hear the appeal under the collateral-order doctrine. *See id.* at 11-12. With regard to fact of injury, the court reasoned that "[i]f the [plaintiffs] establish at the trial for liability that the defendants

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[2] To be sure, the court did recognize that there might be some cases in which fact of injury, or "impact," could be established through classwide proof. *See Blue Bird*, 573 F.2d at 327 & n.34. But here, of course, the causation inquiry is even more complex than in *Blue Bird* itself, given that respondents are alleging a conspiracy to reduce the supply of one product (linerboard) that is *different* from the product they purchased (corrugated boxes and sheets). As the district court below tacitly acknowledged by excluding some purchasers from the class, injury to any given downstream purchaser in such a case is not guaranteed, and certainly cannot be assumed for an entire nationwide class.

engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the [plaintiffs] were consumers of that product, we would think that the jury could reasonably conclude that [defendants'] conduct caused injury to each [plaintiff]." *Id.* at 12 n.11. The Second Circuit's opinion thus suggests that fact of injury is ordinarily not an individual issue that precludes class certification. *Cf. Blue Bird*, 573 F.2d at 324 (discussing *Master Key*); Matthew Lloyd Larrabee, Note, *Substantive Policies and Procedural Decisions: An Approach to Certifying Rule 23(b)(3) Antitrust Class Actions*, 31 Hastings L.J. 491, 503 (1979) (same).

This case presents an ideal vehicle for resolving the important and recurring issue whether the inherently individualized issue of injury precludes class certification. In this case, unlike the "traditional" price-fixing case, there is abundant reason to believe that not all of the would-be class members suffered injury: class members did not purchase the product that was the subject of the alleged conspiracy (here, linerboard) from the defendants, but rather purchased *different* products (here, corrugated boxes and sheets). A given plaintiff must therefore show not only that it made a purchase during the class period, but also that its purchase price was causally linked to the reduction in output of a component of the product. If, for example, an integrated seller of corrugated boxes or sheets decided to absorb, in the case of a particular buyer, any purported increase in the "cost" of linerboard that allegedly resulted from its own decrease in linerboard output, then that buyer would suffer no injury. Thus, to the extent that such would-be class members made indirect *purchases* of the component product from the defendants, they suffer analogous causation difficulties to those faced by indirect *purchasers*, who for that reason are barred altogether from pursuing Sherman Act claims. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31 (1977). Indeed, by the class-certification stage,

defendants had already identified ample evidence that at least some class members suffered *no* injury from defendants' alleged conduct, as the district court partially conceded in modifying the proposed class definitions. *See, e.g.*, C.A. App. 1033-34, 1417, 1421-1539, 1555; C.A. Supp. App. 42. In the light of this evidence, any assertion that fact of injury can somehow be proven on a classwide basis is simply illusory.

The Third Circuit erred by accepting respondents' assurances that their "experts" could establish individual injury to all class members; because, as the Fourth Circuit emphasized in *Windham*, the injury issue is *inherently* individualized, it simply cannot be established on a classwide basis. 565 F.2d at 66. No expert can prove on a classwide basis that each and every member of a putative class was injured by an alleged antitrust violation—determining which class members were injured would require an individual analysis of every transaction. *See, e.g., id.*; *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 236 & nn.8-9 (9th Cir. 1974). Needless to say, plaintiffs cannot obtain class certification with respect to an inherently individualized issue by simply asserting that their "experts" can address that issue on a classwide basis. Were the law otherwise, the requirements of Rule 23 would be a hollow formality, because plaintiffs could simply proffer "expert" testimony purporting to show that inherently individualized issues were common after all.

The effect of the Third Circuit's decision cannot be overstated. By allowing respondents to proceed with a class action simply by proffering experts who assert that the fact of injury can be established on a classwide basis, the Third Circuit has subjected petitioners to the risk of a trial in which they, as defendants, may be forced to bear the burden of demonstrating that each of thousands of individual plaintiffs, including absent class members, was *not* injured by their alleged misconduct. By shifting the burden of proof in this manner, the Third Circuit has not only violated the requirements of Rule 23, but also

abridged petitioners' substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b), and contravened basic constitutional principles of due process. And the lenient approach adopted by the Third Circuit to the fact-of-injury issue "encourage[s] plaintiffs' attorneys to seek certification * * * in hopes of exploiting the enormous tactical advantages of class status during settlement negotiations." Larrabee, *supra*, at 507.

B. The Third Circuit Erred, And Deepened A Circuit Conflict, By Holding That Fraudulent Concealment Can Be Established On A Classwide Basis.

The Third Circuit's decision in this nationally significant case raises a second issue—fraudulent concealment in class actions—that has been the subject of substantial conflict and inconsistency in the federal court system. As this Court has noted, fraudulent concealment is an equitable doctrine that is read into every federal statute of limitation. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). It is invoked "fairly often" in antitrust litigation, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 195 (1997), as a means of extending the Clayton Act's four-year limitations period for antitrust claims, *see* 15 U.S.C. § 15*b*. In this case, there is no question that plaintiffs must prove fraudulent concealment in order to prevail on many of their claims: as the Third Circuit noted, *see* App. 27a, most of the class period (from October 1993 to November 1995) falls more than four years before the complaints were filed in May 1999, and claims relating to purchases made during that portion of the class period will thus be time-barred absent tolling of the statute of limitations through a doctrine such as fraudulent concealment.

Although fraudulent concealment is a judge-made doctrine, there is broad consensus that it has three elements: (1) concealment by the defendant of the conduct underlying the cause of action; (2) a failure by the plaintiff to discover his cause of action notwithstanding such concealment; (3) the

exercise of due diligence by the plaintiff in attempting to discover the cause of action. *See, e.g., In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1178-79 (3d Cir. 1993); *Norton-Children's Hospitals, Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 443 (6th Cir. 1981); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1169 (5th Cir. 1979). It is also "generally" recognized, in the class action context, that the discovery and diligence elements of fraudulent concealment require an individualized inquiry. *See* 70 A.L.R. Fed. 498 (1984) (citing cases).[3]

As the Third Circuit frankly conceded, however, courts are divided on the recurring question whether the inherently individualized nature of these elements of the fraudulent concealment doctrine precludes class certification. *See* App. 31a-32a. The Fourth Circuit has held that it does. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (1998). In *Broussard*, the Fourth Circuit considered the certification of a class of franchisees that alleged that their franchisor had committed torts and breach of contract by misusing funds the franchisees paid for use in advertising. *See id.* at 334-36. Many of the franchisees' claims would have been time-barred but for the doctrine of fraudulent concealment. *See id.* at 336.

The Fourth Circuit reversed the district court's decision to certify a class. *See id.* at 352. Writing for the court, Chief Judge Wilkinson explained that "when the defendant's affirmative defenses (such as * * * the statute of limitations) may depend on facts peculiar to each plaintiff's case, *class certification is erroneous*." *Broussard*, 155 F.3d at 342 (emphasis added; internal quotation omitted). The court noted

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[3] The third element of fraudulent concealment, concealment itself, also requires an individualized inquiry in cases where, as here, plaintiffs allege that the concealment consisted of independent communications by defendants with members of the plaintiff classes.

that the misrepresentations on which plaintiffs based their fraudulent-concealment argument varied from franchisee to franchisee, and therefore required an individualized inquiry into what each franchisee knew about the franchisor's operation and when the franchisee knew it. *See id.* Moreover, the court noted, some franchisees had actual knowledge that funds the franchisees had paid for use in advertising were being used for allegedly improper payments. *See id.* For these reasons, the court concluded that class certification was inappropriate. *See id.*

The First Circuit, however, has flatly disagreed with *Broussard*. In *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (2000), the First Circuit squarely held that reliance on the doctrine of fraudulent concealment will not preclude class certification. In so concluding, the First Circuit reviewed the certification of a class of stock purchasers who brought state-law claims for breach of contractual warranty against a company that allegedly had made misrepresentations in its financial statements. *See id.* at 291. The district court recognized that a number of the claims at issue would have been time-barred but for the doctrine of fraudulent concealment, but reasoned that the factual questions at issue centered on the fact that the defendant had exclusive control over the collection and release of its financial data. *See id.*

The First Circuit agreed, and affirmed the district court's decision to certify the class. *See id.* at 299. Writing for the court, Judge Selya reasoned that, while the existence of individual issues relating to limitations defenses "invariably weighs against class certification," it was inappropriate to treat the presence of individual issues as an "automatic disqualifier" under the predominance requirement of Rule 23(b)(3). *Id.* at 296. The court added that "[a]s long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification

under Rule 23(b)(3)," *id.* (citation omitted), and that "[p]redominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test," *id.* (footnote omitted).

In its analysis, the First Circuit expressly rejected the Fourth Circuit's suggestion in *Broussard* that class certification was inappropriate whenever the defendant's affirmative defenses (such as the statute of limitations) may depend on facts peculiar to each plaintiff's case. *See id.* at 296 n.4. The court asserted that the Fourth Circuit's reasoning, "to the extent that it purports to establish a *per se* rule, contradicts the weight of authority and ignores the essence of the predominance inquiry." *Id.* The court proceeded to uphold the district court's conclusion that individual issues relating to limitations defenses did not predominate. *See id.* at 297.[4]

In its opinion in this case, the Third Circuit not only expressly recognized the split between the First and Fourth Circuits, but it also expressly took sides. After a lengthy quotation from the First Circuit opinion in *Waste Management*, the Third Circuit embraced the First Circuit's reasoning, stating outright that it "accept[ed] this reasoning as more persuasive than that espoused by the Court of Appeals for the Fourth Circuit in *Broussard*." App. 32a. In so doing, the Third Circuit deepened the preexisting split. Moreover, the Third Circuit indicated that its analysis did not turn on the facts of the instant case, but rather that it was establishing a categorical rule that common issues always predominate with respect to fraudulent concealment. The court stated in unqualified terms that "[i]t is

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[4] In *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2001), the Second Circuit refused to allow an appeal of a district court decision certifying a class in which fraudulent concealment was alleged, but seemed to suggest that, if it had reached the merits, it either would have agreed with the First Circuit that common issues predominate, or simply would have modified the class definition to carve out the otherwise time-barred claims, *see id.* at 143.

the fact of *concealment* that is the polestar in an analysis of fraudulent concealment," and added that "[t]hese allegations of proof are all common to the defendants, not the plaintiffs." *Id.* at 32a-33a. Because the Third Circuit's decision is squarely in conflict with the Fourth Circuit's equally (if diametrically) unconditional decision in *Broussard*, *certiorari* is warranted.[5]

Even beyond the split of authority among the courts of appeals, *certiorari* is all the more appropriate because a significant number of district courts have come down on both sides of the split. Many district courts have held that class certification is inappropriate in cases in which fraudulent concealment has been alleged. *See, e.g., Hall v. Burger King Corp.*, No. 89-0260-Civ, 1992 WL 372354, at *9 n.8 (S.D. Fla. Oct. 26, 1992); *Wagner v. Central La. Elec. Co.*, 99 F.R.D. 279, 289-90 (E.D. La. 1983); *Township of Susquehanna v. H&M, Inc.*, 98 F.R.D. 658, 668 (M.D. Pa. 1983); *Daniels v. Amerco*, No. 81 Civ. 3801, 1983 WL 1794, at *4 (W.D.N.Y. Mar. 10, 1983); *In re Anthracite Coal Antitrust Litig.*, 78 F.R.D. 709, 719-20 (M.D. Pa. 1978); *Rubenstein v. Rossmoor Constr. Corp.*, Civ. No. Y-76-1033, 1978 U.S. Dist. LEXIS 19224, at *12 (D. Md. Mar. 6, 1978); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 124 (C.D. Cal. 1978); *Lohse v. Dairy Comm'n of Nev.*, No. R-75-194-BRT, 1977 WL 1523, at *4 n.1 (D. Nev. Dec. 21, 1977); *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140, 153-54 (E.D. Pa. 1976); *Chmieleski v. City Prods. Corp.*, 71 F.R.D. 118, 160 n.38 (W.D. Mo. 1976); *In re Transit Co. Tire Antitrust Litig.*, 67 F.R.D. 59, 74 (W.D. Mo. 1975); *Bill Minnielli Cement Contracting, Inc. v. Richter Concrete*

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[5] On the closely related question whether individual issues predominate with respect to affirmative *fraud* claims, courts of appeals have generally held that they do, since such claims require scrutiny of the plaintiffs' reliance as well as the defendant's conduct. *See, e.g., Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 189-94 (3d Cir. 2001); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-83 (5th Cir. 1973).

Corp., 62 F.R.D. 381, 390 (S.D. Ohio 1973).

Other district courts have held exactly the opposite. *See, e.g., In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 488 (W.D. Pa. 1999); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 519-20 (S.D.N.Y. 1996); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384-85 (S.D.N.Y. 1996); *In re Aluminum Phosphide Antitrust Litig.*, 160 F.R.D. 609, 615 (D. Kan. 1995); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 698-99 (D. Minn. 1995); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1044 (N.D. Miss. 1993); *In re Infant Formula Antitrust Litig.*, No. MDL 878, 1992 WL 503465, at *6 (N.D. Fla. Jan. 13, 1992); *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 42-43 (S.D.N.Y. 1990); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 262, 272 (D. Minn. 1989); *Fisher Bros. v. Mueller Brass Co.*, 102 F.R.D. 570, 579 (E.D. Pa. 1984); *Abramovitz v. Ahern*, 96 F.R.D. 208, 218 (D. Conn. 1982); *In re Screws Antitrust Litig.*, 91 F.R.D. 52, 58 (D. Mass. 1981); *In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 307 (E.D. Pa. 1980); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154-55 (E.D. Pa. 1979); *Hedges Enters., Inc. v. Continental Group, Inc.*, 81 F.R.D. 461, 476 (E.D. Pa. 1979); *In re Indep. Gasoline Antitrust Litig.*, 79 F.R.D. 552, 559 (D. Md. 1978); *In re Plywood Antitrust Litig.*, 76 F.R.D. 570, 585-86 (E.D. La. 1976); *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 348 (E.D. Pa. 1976).

This disarray is especially noteworthy because district-court decisions on class certification were only rarely susceptible to interlocutory review until the adoption in 1998 of Rule 23(f), which authorized courts of appeals, at their discretion, to hear interlocutory appeals from class-certification decisions. All but one of the above-cited district-court decisions were issued before 1998, and the relative difficulty in obtaining interlocutory review in the pre-23(f) era perhaps suggests that the split of authority at the court-of-appeals level would be even deeper had interlocutory review been more readily available.

At a minimum, the large number of dissonant district-court decisions on this issue illustrates its frequent recurrence.

Finally, this case presents a perfect vehicle for addressing the question presented. Before the district court, petitioners introduced evidence that each of the five named plaintiffs stood in a unique position with respect to the individual issues of discovery and diligence. On the one hand, the president of Garrett Paper testified that she was "sure" that her vendor, one of the petitioners, was engaging in illegal activity when her company's purchase price for corrugated boxes increased during the class period, and added that she even went so far as to accuse her vendor of price fixing. On the other hand, the evidence indicated that General Refractories had no communications at all with any of the petitioners (aside from invoices) during the class period. The Third Circuit painstakingly catalogued all of this evidence, but inexplicably did not comment on it in concluding that common issues predominated with respect to fraudulent concealment. *See* App. 30a n.13. Because the courts below had before them uncontroverted evidence that individualized inquiries were required as to the issues of discovery and diligence, the question whether those individual issues preclude class certification is squarely presented here.

Whether class actions can proceed when a substantial portion of the class members' claims would be barred but for proof of fraudulent concealment is a vital question to litigants in antitrust cases and beyond. Class-action defendants should not be forced to wait until the damages phase in order to litigate individual issues relating to their limitations defenses. Such a rule would contravene the very purpose of statutes of limitations, which is to provide repose from being forced to litigate time-barred claims at all. *See, e.g., Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988). The Court should grant *certiorari* to resolve the circuit split on this recurring question of great practical and legal importance.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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January 14, 2003

APPENDIX
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4535

IN RE: LINERBOARD ANTITRUST LITIGATION
(MDL No. 1261)

WINOFF INDUSTRIES, INC.

v.

STONE CONTAINER CORPORATION, JEFFERSON SMURFIT CORP., SMURFIT-STONE CONTAINER CORP., INTERNATIONAL PAPER CO., GEORGIA PACIFIC CORP., WEYERHAEUSER PAPER CO., TEMPLE-INLAND INC.*, GAYLORD CONTAINER CORP.*, UNION CAMP CORP., TENNECO, INC., TENNECO PACKAGING AND PACKAGING CORPORATION OF AMERICA
(D.C. Civil No. 98-cv-05055)

GENERAL REFRACTORIES COMPANY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED

v.

STONE CONTAINER CORPORATION
(D.C. Civil No. 99-cv-01341)

Stone Container Corporation, Jefferson Smurfit Corp., Smurfit-Stone Container Corp., International Paper Co., Georgia Pacific Corp., Weyerhaeuser Paper Co., Temple-Inland Inc.*, Gaylord Container Corp.*, Union Camp Corp., Tenneco, Inc., Tenneco Packaging and Packaging Corporation of America,

Appellants.

(* Amended per Clerk's Order dated 2/5/02)

Present: BECKER, Chief Judge, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH and ALDISERT,* Circuit Judges.

SUR PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

BY THE COURT:

/s/

Ruggero J. Aldisert
Circuit Judge

October 16, 2002

*As to panel rehearing only.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4535

IN RE: LINERBOARD ANTITRUST LITIGATION
(MDL No. 1261)

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Appellants.

(* Amended per Clerk's Order dated 2/5/02)

Appeal from the United States District Court
For the Eastern District of Pennsylvania

September 5, 2002

Before McKEE, FUENTES and ALDISERT, Circuit Judges.

ALDISERT, Circuit Judge.

This appeal by manufacturers of linerboard[1] requires us to decide if the district court erred in granting two motions for class certification by groups of plaintiffs who brought antitrust law suits alleging that the linerboard manufacturers engaged in a continuing combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Appellants contend that plaintiffs

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[1] Linerboard includes any grade of paperboard suitable for use in the production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes and for a variety of industrial and commercial applications. Corrugated sheets are made by gluing a fluted sheet which is not made of linerboard, known as the corrugating medium, between facing sheets of linerboard; corrugated sheets are also referred to as containerboard. Appellants are major integrated manufacturers and sellers of linerboard, corrugated sheets and corrugated boxes.

failed to establish that the putative class met the requirements of Rule 23(b)(3), Federal Rules of Civil Procedure, which compel the court to:

> find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[2]

Appellants are represented through briefs and oral argument by two groups of manufacturers, the "International Paper Appellants"[3] and the "Georgia Pacific Appellants."[4]

After individual law suits were filed in the Northern District of Illinois and the Eastern District of Pennsylvania,[5] the cases were transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of Pennsylvania for coordinated and consolidated pretrial proceedings.

The district court established two classes:

> All persons in the United States who purchased corrugated *containers* directly from any Defendant at any time during the period October 1, 1993 through November 30, 1995, but excluding Defendants, their

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[2] In the posture of the case presented to us, Appellants are not *ipsis verbis* challenging the district court's determination that the putative classes met the requirements of Rule 23(a).

[3] International Paper Co., Weyerhaeuser Paper Co., Gaylord Container Corp., Union Camp Corp., Tenneco Inc., Tenneco Packaging Corp. of America.

[4] Georgia-Pacific Corp., Temple-Inland Inc., Jefferson-Smurfit Corp., Stone Container Corp. and Smurfit-Stone Container Corp.

[5] A detailed history of the litigation, and action of the Judicial Panel on Multi-District Litigation for coordinating and consolidating pre-trial proceedings, is set forth in *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197 (E.D. Pa. 2001).

> respective parents, subsidiaries and affiliates and federal, state and local governmental entities and political subdivisions.
>
> * * *
>
> All individuals and entities who purchased corrugated *sheets* in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities.

In re Linerboard Antitrust Litig., 203 F.R.D. 197, 203 (E.D. Pa. 2001) (emphasis added). These classes are presented before us as the "Box Appellees" and the "Sheet Appellees."

The district court concluded that the putative classes met the requirements of Rule 23(a) and noted that:

> there is an overlap between the predominance requirement of Rule 23(b)(3) and the prerequisite of Rule 23(a)(2) that common questions exist. "The courts have repeatedly focused on the liability issues, in contrast to damage questions, and, if they found issues were common to the class, have held that Rule 23(b)(3) was satisfied." 4 NEWBERG ON CLASS ACTIONS, § 18-26.

Id. at 214.

The court then decided that the putative classes had met the requirements of Rule 23(b). The court determined first, that plaintiffs presented sufficient evidence to support claims that the conspiracy to raise the price of linerboard correspondingly raised the price of corrugated products. It went on to "conclude[] that plaintiffs' allegations regarding impact, like their allegations regarding conspiracy, will focus the inquiry on defendants' actions, not on individual questions relating to particular class members." *Id.* at 220.

I.

The International Paper Appellants argue that the district court erred in holding that Appellees have sufficiently demonstrated that they will be able to prove common impact at trial. In support of this major premise, they contend that the court erred in applying a legal presumption of impact and failing to apply rigorous scrutiny to plaintiffs' proffered impact evidence. They contend also that the court erred in ignoring the individual issues raised by plaintiffs' claim of fraudulent concealment.

For their part, the Georgia Pacific Appellants argue that the district court erred because here the existence of injury, and hence potential liability, requires an inherently individualized inquiry. Similarly, they argue that the court erred in certifying classes because the existence of fraudulent concealment also requires an inherently individualized inquiry.

We review a district court's grant of class certification under an abuse of discretion standard. *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 165-166 (3d Cir. 2001).

> In *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756-757 (3d Cir. 1974) (*in banc*), we articulated the standard of review applicable to class action decisions. We must decide whether the 23(a) prerequisites have been met, whether the district court correctly identified the issues involved and which are common, and whether it properly identified the comparative fairness and efficiency criteria. If the court's analysis on these points is correct, then, "it is fair to say that we will ordinarily defer to its exercise of discretion" embodied in the findings on predominance and superiority. *Id.*

Bogosian v. Gulf Oil Corp., 561 F.2d 434, 448 (3d Cir. 1977).

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337(a). Pursuant to Rule 23(f), Federal Rules of

Civil Procedure, Appellants timely petitioned this court for permission to appeal the district court's September 4, 2001, Order. We granted the petition and allowed the appeal by an order dated December 18, 2001, and now affirm.

II.

In presenting their theory of antitrust liability, Appellees averred that even though demand for linerboard was strong and rising between 1989 and 1992, the manufacturers' prices for linerboard had fallen; that the manufacturers attempted to increase prices during 1991, 1992 and the first half of 1993, but the price increase announcement did not "stick" and, therefore, the manufacturers had to rescind them. It was at this point in September 1993, plaintiffs allege, that Roger Stone, president of Stone Container Corporation, the largest corrugated paper manufacturer, reported that "the past five years have been the only five-year period (going back as far as the 1920's) when the containerboard industry has had consistently declining prices. It's never happened before, never happened in the depression, but it's happened these last five years." App. at 710.

According to plaintiffs, declining prices were attributed to excess inventory or inventory overhang. They also maintained that Stone Container masterminded a two-fold plan among the manufacturers to lower the industry inventory to a five-week supply for a 2.5 million ton threshold, in order to implement price increases. The Packaging Corporation of America stated in the fall of 1993:

> Weakness in containerboard pricing during the first half of 1993 was more supply-related than demand-related. Earlier this year, industry inventories of containerboard hovered above 2.9 [million] tons and nearly [six] weeks of supply, above the 2.5-2.6 [million] tons and 5.0-5.2 week range usually required to sustain a price increase.

App. at 1553.

The plan was two-fold. First, the manufacturers would close their mills for "market downtime," thereby reducing industry inventory at mills and box plants. Second, Stone would purchase inventory from other manufactures while idling its own mills. In implementing this conspiracy, during late June and early July 1993, Roger Stone conducted a telephone survey of his competitors. He coordinated the industry-wide downtime and agreed to have his company purchase a significant volume of linerboard from its competitors rather than meet the requirements from its own production. Stone took downtime of approximately 180,000 tons of containerboard by shutting six of its mills during the following weeks and months.

The manufacturers closed their mills between July and December. By October 1993, they had concerted their actions and had lowered total inventories to the desired level of less than a five-week supply. A total of 435,000 tons had been withdrawn from the market. Inventory reached "a twenty-year low in terms of weeks of supply * * *." App. at 733. In October 1993, Appellants successfully increased their prices for containerboard and boxes for the first time in more than two years. Each raised its container prices by an identical amount. Subsequently, the major manufacturers continued their pattern of taking substantial downtime and implementing price increases. In late November, less than two months after the successful October 1 price increase, Stone announced another $30 per ton increase to be effective on January 1, 1994, even though analysts were not expecting another attempt to raise containerboard prices until February or March of that year. Other manufacturers joined, and the price increase became effective in March 1994.

In April 1994, Appellants justified another containerboard price increase citing low inventory. Between the summer of 1993 and March 1995, seven containerboard price increases were implemented in the industry. Linerboard prices in the eastern United States rose in six consecutive escalations from

a low of around $270 to $290 per ton in the third quarter of 1993 to $530 per ton by April 1995. Plaintiffs allege that the roughly 90% recovery in prices resulted in a sharp resurgence in industry profitability as the containerboard increases were passed through in the form of finished box prices. Even the most debt-laden industry players had returned to profitability by the fourth quarter of 1994. App. at 1265.

Thus, plaintiffs' theory of antitrust liability is based on polysyllogisms: (1) Prices in the marketplace are controlled by the economic laws of supply and demand, to wit, if a product is in short supply, the price will increase. During the period in question, linerboard was in short supply. Therefore, during this period, the price of linerboard increased. (2) Closing down production will create a shortage in supply and a corresponding price increase. The linerboard manufacturers closed down production. Therefore, the linerboard manufacturers created a shortage in supply and a price increase.

III.

We address first, the contention that the court erred in applying a presumption of impact, in order to demonstrate that questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The district court did apply such a presumption, relying on the oft-quoted statement in *Bogosian*, familiarly described as the "*Bogosian* short-cut":[6]

> If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.

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[6] *See* Affidavit of Dr. Robin Cantor, App. at 608-629.

> If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage. "[The] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by * * * proof of some damage flowing from the unlawful conspiracy * * *." *Zenith Radio* [*Corp. v. Hazeltine Research, Inc.*], 395 U.S. [100, 114 n.9 (1969)]. Under these circumstances, proof on a common basis would be appropriate. Even if the variation in price dynamics among regions or marketing areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price, it might be possible to designate subclasses to conform with these variations. *See In re Antibiotic Antitrust Actions*, 333 F. Supp. [278, 281 (S.D.N.Y. 1971)].

Bogosian, 561 F.2d 434, 455 (3d Cir. 1977) (emphasis omitted).[7]

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[7] The panel was unanimous on this point. The dissent would have affirmed the grant of summary judgment, contending that plaintiffs had six years of discovery in order to decide on a theory of liability and should not have been given additional time to do so.

> This is not a pro se case. Plaintiffs' counsel are competent, experienced and, in fact, nationally renowned attorneys in the antitrust field. * * * In my view [after six years], this case has long since passed the stage where anyone concerned — parties, lawyers, or judges — should have to speculate as to the theory of the litigation. * * * Moreover, until the theory of the case is settled, it will not be known which facts are "relevant" facts.

Appellants challenge the following determination of the district court:

> Plaintiffs have shown that they plan to prove common impact by introducing generalized evidence which will not vary among individual class members. For example, plaintiffs contend that even though prices may have varied among regions, the alleged conspiracy caused these prices to rise throughout the country. Although the prices for corrugated sheets and boxes may have increased due to demand, because defendants allegedly conspired to reduce production of linerboard, the price was higher than it would have been under competitive conditions. Such allegations, supported by the evidence presented, are of the kind contemplated by the Third Circuit in *Bogosian* and *Newton*. *See also*, *Lumco Indus.*, [*Inc. v. Jeld-Wen, Inc.*], 171 F.R.D. [168, 173 (E.D. Pa. 1997)].
>
> The Court recognizes that defendants dispute plaintiffs' allegations. However, at the class certification stage, "the Court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve common issues of fact and law." *Lumco Indus.*, 171 F.R.D. at 174. "Plaintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the

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> Facts are only relevant insofar as they support a valid legal theory.

Bogosian, 561 F.2d at 457 (Aldisert, J., dissenting).

> plaintiff class." *Id.* (citing *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524 (M.D. Fla. 1996)). Therefore, the Court concludes that plaintiffs' allegations regarding impact, like their allegations regarding conspiracy, will focus the inquiry on defendants' actions, not on individual questions relating to particular plaintiff class members.

Linerboard, 203 F.R.D. at 220.

A strong argument can be made that the *Bogosian* concept of presumed impact was properly applied here. The economic laws of supply and demand run in tandem with the tenets of logic. A reduction in supply will cause prices to rise. A deliberate cut in supply, as alleged here, is a deliberate interference with market forces. Coincident with this interference with the normal market forces, linerboard prices in the eastern United States rose in six consecutive price increases, from a low of around $270 to $290 per ton in third quarter 1993 to $530 per ton by April 1995. Reduced to its essence, what Appellants say is that there is no correlation between the reduction in supply of linerboard and the subsequent price increases. What they really contend is that plaintiffs' argument is anchored on the familiar fallacy of *post hoc propter hoc*, the fallacy of inferring causation from temporal succession only, a reasoning from what happens in sequence is merely an assumption of a causal connection.

The *post hoc* accusation is trumped, however, by the laws of economics. If the facts do, in fact, support plaintiffs' theory that "an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price[,]" *Bogosian*, 561 F.2d at 455, this would be a demonstration of the laws of supply and demand at work.

IV.

But there is more to this case than exclusive reliance on the presumed impact theory. The district court used a belt and suspenders rationale to support its conclusion that the putative class had met its burden of showing impact. In addition to relying on the *Bogosian* short cut, it credited the testimony of plaintiffs' experts, opinions that were supported by charts, studies and articles from leading trade publications. These experts suggested that advanced econometric models could be effectively prepared to establish class-wide impact.

A.

In reaching its decision, the district court made note of plaintiffs' expert Dr. John Beyer, who presented two possible means of assessing impact on a class-wide basis—multiple regression analysis, and the benchmark or yardstick approach, which he described as methods of showing "an antitrust impact by generalized proof." Affidavit of Dr. John C. Beyer, App. at 673-675. *See also, In re Plastic Cutlery Antitrust Litig.*, No. CIV. A. 96-CV-728, 1998 WL 135703, at *7 (E.D. Pa. Mar. 20, 1998); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 485-486 (W.D. Pa. 1999) (identifying multiple regression analysis as a method of proving impact).

Dr. Beyer made an extensive empirical investigation into the behavior of linerboard and corrugated box prices over time, which proved a basis for his opinion of common impact. He stated that he had studied the structure of the industry, including Appellants' market power, geographical overlap, the fungible nature of the products, the inelastic demand and lack of a substitute. He found that "corrugated container prices are strongly influenced by linerboard prices." Because of these industry characteristics "all class members would be impacted by higher corrugated container prices." App. at 672.

Significantly, Dr. Beyer stated that he found that linerboard and corrugated box prices were closely correlated. He concluded that linerboard transaction prices, as well as

corrugated containerboard prices, behaved similarly over time across different regions of the country and across different types of linerboard. These findings, sometimes referred to as "structure in pricing," demonstrated to Dr. Beyer that "[d]espite any variations in particular boxes or customers, prices for all corrugated containers would have responded over time to linerboard price increases in a similar manner * * *." *Id.* Based on this qualitative analysis, he concluded that the "alleged conspiracy would have had a common, class-wide impact, and that all purchasers of corrugated containers would have paid a higher price as a result of the conspiracy." *Id.* at 673. We deem his conclusion to be significant because it was supported by charts and studies.

In discussing these feasible approaches, which could be used to provide quantitative methods for corroborating his opinion on impact and for estimating damages, he suggested as a potential benchmark, the potential prices charged for linerboard during a competitive period when there would be no effects of the conspiracy. He explained that the necessary data was available to do the analysis and described the types of data he would use. He discussed also a multiple regression model "to isolate the effects of various influences on corrugated container prices, thereby allowing a determination of the impact of any one of the variables, including, in this case, the impact of the conspiracy." *Id.* at 674.

B.

The plaintiffs also presented an affidavit of Dr. Robin C. Cantor who stated that "[b]ased on my analysis of the pricing data and company records, I conclude that the alleged unlawful conduct to raise linerboard prices would have impacted all members of the proposed class through higher corrugated sheet prices." App. at 612. We deem this conclusion to also be extremely significant.

Such a conclusion was supported by relevant data. For example, she indicated that the containerboard industry is

relatively concentrated and that during the relevant period, 77 percent of linerboard and 71 percent of the "corrugated medium" was produced by the top ten firms and that overall, 73 percent of containerboard production was concentrated in the top ten firms. *Id.* at 614. She also indicated that benchmark prices are published weekly in a number of sources including "The Yellow Sheet," "*Pulp and Paper Week*" and "Pulp & Paper's North American Fact Book," and that "[a]ccording to a Weyerhaeuser document, 'linerboard is the industry's indicator price.'" *Id.* at 619. Dr. Cantor recognized that "[c]orrugated boxes are the most popular shipping containers in the world. Over 90 percent of all products in the United States are shipped in corrugated cardboard boxes." *Id.* at 623 (quoting the American Forest and Paper Association website). Emphasizing this dominance over the shipping industry, Dr. Cantor remarked that:

> [t]he market began to turn in the third quarter of 1993 when containerboard producers announced an estimated 400,000 tons of downtime to reduce linerboard and medium inventories just as box shipments began to pick up. [(quoting *Linerboard: Prices Soar to Record Levels as Shortage Condition Prevail*, PULP & PAPER WEEK, Vol. 69, No. 1 at 13).]
>
> The industry is gradually responding to the soft linerboard market by announcing significant downtime to be taken in the third quarter. Announcements to date of downtime by Stone, Temple-Inland, Union Camp, IP and [Packaging Corporation of America] amount to roughly 300,000-350,000 tons of production or 5.4% of the industry's capacity during the "three month period." [(quoting *Linerboard Markets—Industry Report*, Donaldson, Lufkin & Jenrette Securities, August 10, 1993).]

App. at 626.

She also indicated that there are several accepted statistical or mathematical approaches that could be used to determine the percentage or absolute overcharge due because of the effect of a conspiracy to manipulate prices. App. at 628. She suggested that "benchmarking," which uses "competitive prices for other comparable products to estimate the pattern of prices but-for the alleged misconduct[,]" could be effectively employed in this situation. *Id.* Another proffered model would "compare[] prices during non-conspiratorial periods with product prices during the alleged conspiracy," and yet a third approach would use revenue, production and profit data to derive prices that are consistent with "yardstick" competitive performance levels.

Most significantly, she concluded:

> In sum, containerboard and corrugated sheet products exhibit sufficient characteristics and their sale and production exhibit sufficient economic conditions to control for product variations in a price analysis. In combination, these characteristics and conditions indicate that a price-fixing conspiracy would have a common impact on all members of the proposed class and that feasible methods can be used to estimate damages reliably on a class-wide basis.

App. at 629.

C.

Based on the foregoing, we conclude that the district court did not err in determining that plaintiffs showed that they could establish injury on a class-wide basis. Plaintiffs produced affidavits of expert witnesses, Dr. Beyer and Dr. Cantor, who effectively utilized supporting data, including charts and exhibits, to authenticate their professional opinions that all class members would incur such damages. We decide that this was not a case where plaintiffs relied solely on presumed impact and damages.

In commenting on plaintiffs' submissions, the district court referred to the teachings of *Newton* for the proposition that this court does not require plaintiffs to have selected a particular econometric model for demonstrating impact (or proving damages) at the class certification stage. In *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244 (S.D. Tex. 1978), the identical situation was presented to that court where plaintiff had identified two generally accepted methodologies, which he planned on using to determine impact and damages. Relying heavily on *Bogosian*, the court accepted that contention and certified the class. *Id.* at 251-252. Without explicitly so stating, the district court, like the *Corrugated Container* court, did not require the experts to pick one particular method over another at the class certification stage, recognizing that the certification stage is early in the overall litigation process. *Linerboard,* 203 F.R.D. at 219.

Accordingly, we reject the contention that plaintiffs did not demonstrate that sufficient proof was available, for use at trial, to prove antitrust impact common to all the members of the class.

V.

A significant portion of Appellants' briefing, and a major emphasis at oral argument, was that the factual allegations alleged here track precisely the factual scenario in *Newton*, and therefore, the district court erred in not following the holding of *Newton* and denying class certification. At oral argument, counsel for Appellants referred to *Newton* as "provid[ing] the guide for resolution in this case" and referred to a single sentence contained therein that constituted, in his formulation, a "teaching [that] holds with respect to both of our submissions today."[8] That passage reads as follows: "If proof of the

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[8] "Counsel: Let me, if I may, begin with this Court's decision in *Newton*, which we believe provides the guide for resolution in this case.

* * *

essential elements of the cause of action requires individual treatment, the class certification is unsuitable." *Newton,* 259 F.3d at 172 (citing *Binder v. Gillespie*, 184 F.3d 1059, 1063-1066 (9th Cir. 1999) (upholding class decertification where presumption of reliance and loss unavailable), *cert. denied*, 528 U.S. 1154 (2000)).

We have several problems with this argument. In and of itself, the quotation can be interpreted as the obverse of Rule 23(b)(3), Federal Rules of Civil Procedure, in the sense that "if any questions affecting individual members" predominate over "questions of law and fact," class certification is unsuitable. Clearly, if proof of the essential elements of the cause of action require individual treatment, then there cannot be a predominance of "questions of law and fact common to the members of the class."

Equally important, the quotation at issue must be considered in the precise context in which it was used in *Newton*. It formed the final sentence of a paragraph in which we discussed permissible presumptions, proof of reliance and injury in *securities* cases. Having cited a number of cases upholding presumptions of reliance in Rule 10b-5 claims, we stated that where a presumption of reliance and loss was not available, as in *Binder*, it would be necessary for each plaintiff to prove the

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"And I would like to guide the Court * * * to the language in *Newton*. And if you will indulge me, I'm going to quote one sentence * * *. If proof, if proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.

"Now, that teaching holds with respect to both our submissions today. [Co-counsel] has been speaking about causation or impact or injury. It also goes to proof of the essential elements of fraudulent concealment, the second part of our submission today."

Transcript of Oral Argument in *In re Linerboard Antitrust Litig.*, No. 01-4353 (before the Court of Appeals for the Third Circuit, recorded in Philadelphia, Pennsylvania, July 19, 2002, at 16-17).

essential elements of the cause of action, and, if so, class certification would be unsuitable. *Newton*, 259 F.3d at 172. In *Binder*, the court affirmed the denial of class certification, stating that "[t]he district court reasoned that the class would have to satisfy the reliance element through a presumption; otherwise individual questions of reliance would predominate over questions common to the class." *Binder*, 184 F.3d at 1063.

A.

We consider it useful to identify the precise flashpoint of controversy at stake in *Newton*. Roscoe Pound taught us that the judicial process distinguishes discrete functions in the appellate decisional process: (1) finding or choosing (or creating) the law where the dispute is over the choice of the controlling legal precept; (2) if there is no dispute as to its selection, a disagreement over its interpretation; and (3) where there is agreement on the precept and its interpretation, the sole question is the application of the law to the facts, which Pound described as "[a]pplication of the abstract grounds of decision to the facts of the particular case."[9] The precise holding in *Newton* was that the facts common to the members of the class did not predominate. No new legal precept was created; no new nuance of interpretation was forthcoming. It was merely the application of ruling case law in this court to the facts of that case.

The process of justifying a court's decision always requires application of a legal precept to a particular factual situation. The application may be purely mechanical, as it is in most cases. If the facts are similar to those in an earlier case announcing a rule of law, the doctrine of precedent becomes operative. Where there is no quarrel over the choice and interpretation of the legal precept, here Rule 23(b)(3), the root

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[9] Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 950-951 (1923).

controversy usually is traced to a value judgment of whether there is sufficient similarity between the fact situations under comparison. Edward R. Levi amply described this kind of assessment when he stated: "[t]he scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar * * *. The finding of similarity or difference is the key step in the legal process."[10] To predict a court's actions in a precept-application controversy, therefore, requires a prediction of what facts in the compared cases a given court, at a given time, will deem either material or insignificant. The facts considered material are "adjudicative facts," described by Hart and Sacks as "facts relevant in deciding whether a given general proposition is or is not applicable to a particular situation."[11]

B.

For Appellants' argument to prevail, therefore, they must demonstrate that the facts in *Newton* are substantially similar to the facts in the case at bar, what logicians call inductive reasoning by analogy, or reasoning from one particular case to another. To draw an analogy between two entities is to indicate one or more respects in which they are similar and thus argue that the legal consequence attached to one set of particular facts may apply to a different set of particular facts because of the similarities in the two sets. Because a successful analogy is drawn by demonstrating the resemblances or similarities in the facts, the degree of similarity is always the crucial element. You may not conclude that only a partial resemblance between two entities is equal to a substantial or exact correspondence.

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[10] Edward H. Levi, *Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 501-504 (1948).

[11] HENRY HART & ALBERT SACKS, THE LEGAL PROCESS 384 (tent. ed. 1958).

Logicians teach that one must always appraise an analogical argument very carefully. Several criteria may be used: (1) the acceptability of the analogy will vary proportionally with the number of circumstances that have been analyzed; (2) the acceptability will depend upon the number of positive resemblances (similarities) and negative resemblances (dissimilarities); or (3) the acceptability will be influenced by the relevance of the purported analogies. IRVING M. COPI & KEITH BURGESS-JACKSON, INFORMAL LOGIC 166 (3d ed. 1996); Arthur L. Goodheart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 179 (1930); JOHN H. WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW 118 (3d ed. 1942); JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE 98-142 (8th ed. 1916) ("Two things resemble each other in one or more respects; a certain proposition is true of one; therefore it is true of the other.").

For Appellants to draw a proper analogy, they had the burden in the district court, as they do here, of showing that the similarities in the facts of the two cases outweigh the differences. They cannot do so, for two significant reasons. First, in *Newton* it was clear that not all members of the putative class sustained injuries; here, all members sustained injuries because of the artificially increased prices. Secondly, in *Newton* there were hundreds of millions of stock transactions involved, thus making the putative class extremely unmanageable; here, an astronomical number of transactions is not present. The classes are manageable.

We reversed the district court's determination of class certification in *Newton* because it involved a putative securities class action in which purchasers of stocks charged that their broker-dealers breached their duty to execute trades on the most favorable terms reasonably available. *Newton*, 259 F.3d at 161-163. The gravamen of the complaint was that their brokers could have received a better price for securities had they used a computer system other than the central National

Best Bid and Offer system ("NBBO"). The evidence disclosed that on some occasions, the NBBO price was better than on other computer systems, at times, the prices were the same, and at other times, the NBBO price was worse than on other systems. *Id.* at 177-180. Under those circumstances, we concluded that not every class member was injured by the failure of the brokers to find the best possible price. *Id.* at 187-188.

Critical to our determination of whether class certification was proper, we noted that in determining how to execute a client's order, a broker-dealer must take into account order size, trading characteristics of the security, speed of execution, clearing costs, and the cost and difficulty of executing an order in a particular market. *Id.* We were very specific in this respect:

> These factors would appear to vary from class member to class member and, for each class member, from trade to trade. Whether a class member suffered economic loss from a given securities transaction would require proof of the circumstances surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade was requested. This Herculean task, involving hundreds of millions of transactions, counsels against finding predominance.
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> * * *
>
> The alleged injuries in *Newton* arise out of the execution of hundreds of millions of trades, not a single act of fraudulent conduct. The distinct facts among the hundreds of thousands of plaintiffs involving hundreds of millions of trades will determine whether securities violations occurred. Because plaintiffs' claims will require an economic injury determination for each trade, we hold the

> putative class fails to satisfy the predominance requirement.

Id. at 187, 190.

Contrasting the *Newton* facts with those in the case at bar, here there was no evidence that the individuals and entities who purchased corrugated containers or corrugated sheets from Appellants during the relevant two-year period had participated in hundreds of millions of commercial transactions. More important, the *Newton* court was staring a situation in the face where they would necessarily examine every stock purchase or sale because not every member of the putative class was injured. By direct contrast, with certain limited exceptions relating to purchasers whose contracts were tied to a factor independent of the price of linerboard, all purchasers of corrugated sheets and boxes were injured. They were all affected by the increased price of linerboard that reflected in the price paid by plaintiffs.

For the foregoing reasons, we conclude that we cannot accept the analogue so vigorously urged by Appellants because the negative resemblances (dissimilarities) between *Newton* and the case at bar seriously outweigh the positive resemblances (similarities).

VI.

The Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), bans Clayton Act lawsuits by persons who are not direct purchasers from the defendant antitrust violator. Appellants argue that the district court should have denied class certification, under the teachings of *Illinois Brick*, because members of the proposed classes purchased corrugated sheets or boxes, of which linerboard was a mere ingredient, and did not purchase linerboard *per se*. Appellees respond, as they did in the district court, that the facts here come within the purview of our decision and rationale in *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1978), in which we held that the purchasers of candy made by the sugar manufacturers

were not barred from bringing suit under the § 1 of the Sherman Act, 15 U.S.C. § 1, and § 4 of the Clayton Act, 15 U.S.C. § 15.

We posed the question succinctly: Does *Illinois Brick* bar suit by a plaintiff who purchases directly from the alleged offender, but buys a product which incorporates the price-fixed product as one of its ingredients? We held that there was no bar.

Our reasoning began with an explication of the rationale behind *Illinois Brick*:

> The Court grounded its conclusion on several bases, including the possibility of exposing the defendant to multiple liability and the evidentiary complexities that would arise in apportioning the overcharge among those in the chain who had suffered injury. The Court also expressed concern that if the direct purchaser could not make a full recovery of the overcharge, the wrongdoer would be able to keep some of the fruits of its illegality. Based on this reasoning, the Court held that the plaintiff, which purchased a completed building, was not permitted to sue the manufacturer of concrete block which had been incorporated into the structure.

In re Sugar, 579 F.2d at 17.

We then explained why this rule would not apply to the purchasers of candy made with the price-fixed sugar:

> As the defendants here point out, the product which plaintiff purchased competes not with sugar, but with other candy, and more than one ingredient determines the price. To this extent, there will be some additional complications underlying the damage claims. However, this must not be allowed to obscure the fact that the plaintiff did purchase directly from the alleged violator. True, the price-

> fixed commodity had been combined with other ingredients to form a different product. But just as the sugar sweetened the candy, the price-fixing enhanced the profits of the candy manufacturers. The situation is the same as if the general contractor which sold the building to the plaintiff in *Illinois Brick* were the manufacturer of the concrete block which went into the structure. In that situation, the concern which the Supreme Court expressed about the proration of overcharge among a number of entities in the chain would not have been present.
>
> Nor is that problem of allocation among various distributors present in the case *sub judice*. Plaintiff is a direct purchaser and, therefore, entitled to recover the full extent of the overcharge.

Id. at 17-18.

In the case at bar, the district court met this issue head-on, and we agree completely with its analysis. It emphasized that the putative class plaintiffs purchased corrugated sheets or boxes directly from Appellants, and, like the candy in *In re Sugar*, which contained allegedly price-fixed sugar, the corrugated sheets and boxes contain linerboard that was subject to an agreement on output, which is equivalent to a price-fixing agreement. Accordingly, the putative class members are direct purchasers and are entitled to recover the full amount of any overcharge. *See Gen. Leaseways v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594-595 (7th Cir. 1984) ("An agreement on output also equates to a price-fixing agreement * * *. [If] firms restrict output directly, price will * * * rise in order to limit demand to the reduced supply * * *. [R]educing output, and dividing markets have the same anticompetitive effects.").

VII.

This is not a securities case. It is an antitrust case involving allegations that several United States manufacturers of linerboard engaged in a continuing combination and conspiracy

in unreasonable restraint of trade and commerce in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. It is well settled that "[a]ny action to enforce any cause of action under section 15, 15a, or 15c * * * shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15*b*.

Appellants contend that Appellees' claims are time-barred because most of the class period—from October 1993 to November 1995—ended more than four years before the filing of the sheet and box complaints in May 1999. Appellees agree on the time period, but respond that the four-year statute of limitations should be tolled under the doctrine of fraudulent concealment because they had no knowledge of the alleged conspiracy or of any facts that might have led to the discovery thereof in the exercise of reasonable diligence. They contend that it was not until approximately February 25, 1998, when the Federal Trade Commission issued a press release, a complaint and a proposed consent decree against Appellant Stone Container Corporation, describing certain facets of anti-competitive conduct, that they became aware of Appellants' misadventures.

A.

Although § 15b mandates a four-year statute of limitations for civil antitrust actions, it is well established that the doctrine of fraudulent concealment tolls the limitation period when a plaintiff's cause of action has been obscured by the defendant's conduct.

> [I]n order to establish the applicability of the doctrine, an antitrust plaintiff must show three things: (1) fraudulent concealment; (2) failure on the part of the plaintiff to discover his cause of action notwithstanding such concealment; and (3) that such failure to discover occurred [notwithstanding] the exercise of due care on the part of the plaintiff.

70 A.L.R. FED. 498 (1984).

Where an action implicating fraudulent concealment is sought to be brought in a class posture, we must decide whether the required elements of proof are too individualized to permit such treatment.

"It generally has been recognized that the question of concealment by [an] antitrust defendant is a common question, subject to being uniformly resolved on behalf of all members of the class." *In re Flat Glass*, 191 F.R.D. at 487 (citing *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 519 (S.D.N.Y. 1996); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154-155 (E.D. Pa. 1979)). "However, the question of discovery of the cause of action by a plaintiff presents an individual question." *Id.* "Similarly, the issue of due diligence seemingly raises an individual question." *Id.* "Thus, the broad issue of fraudulent concealment presents both common and individual issues; therefore, the determination whether an antitrust action involving fraudulent concealment may proceed as a class action turns upon which aspect of the issue may be considered to predominate." *Id.* (citing *Hedges Enters., Inc. v. Cont'l Group, Inc.*, 81 F.R.D. 461, 476 (E.D. Pa. 1979)).

The cumulative experience of the judiciary has not been uniform in this regard. Some courts have regarded the issue of concealment to predominate, and have held that class certification is permissible, even though some individual questions are present. Other courts have considered individual questions to be too pervasive to permit it to be handled as a class matter. In this judicial circuit, there has been a division of authority, with some cases supporting each view.[12]

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[12] In some cases, the courts held that common questions predominated, and that class actions therefore were permissible. *See In re Flat Glass*, 191 F.R.D. 472 (W.D. Pa. 1999); *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322 (E.D. Pa. 1976); *Hedges Enters., Inc. v. Cont'l Group, Inc.*, 81 F.R.D. 461 (E.D. Pa. 1979); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143 (E.D. Pa. 1979); *In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302 (E.D. Pa. 1980). On the other hand, other Third Circuit District Court cases have expressed the view that questions relating to fraudulent

B.

Appellants argue that common issues of proof do not predominate with respect to the fraudulent concealment issue and that therefore a class action is not the appropriate vehicle for deciding Appellees' claims. International Paper Appellant's Brief at 38-43. They suggest that fraudulent concealment involves a "two-pronged" inquiry—a concealment by the defendant and plaintiff's actual knowledge of it or failure to use due care to discover it—and cannot be established unless *both* prongs are satisfied. In asserting their position, they rely on the language of the Court of Appeals for the Fourth Circuit: "when the defendant's affirmative defenses (such as * * * the statute of limitations) may depend on facts peculiar to each plaintiff's case, class certification is erroneous." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (alteration in original) (internal quotation marks omitted); *see also*, *Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140 (E.D. Pa. 1976); *In re Anthracite Coal Antitrust Litig.*, 78 F.R.D. 709 (M.D. Pa. 1978); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978).

They argue that a number of Appellees are barred from asserting a fraudulent concealment defense to the statute of limitations because they either had prior knowledge of the conspiracy, or did not act with the requisite due diligence, emphasizing that this sort of inquiry is highly personal and is

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concealment in antitrust class actions do not present sufficiently common issues as to permit class action treatment. *See Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140 (E.D. Pa. 1976); *In re Anthracite Coal Antitrust Litig.*, 78 F.R.D. 709 (M.D. Pa. 1978); *Wolfson v. Artisans Sav. Bank*, 83 F.R.D. 547 (D. Del. 1979); *Susquehanna v. H & M, Inc.*, 98 F.R.D. 658 (M.D. Pa. 1983).

susceptible only to individualized proof and, therefore, inappropriate for class treatment.[13]

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[13] Appellants introduced evidence that "each of the five named plaintiffs stands in a unique position with respect to fraudulent concealment that will have to be individually adjudicated if that plaintiff is to recover." International Paper Appellant's Brief at 46. They refer to Lisa Garrett, president of Garrett Paper, who testified that she was "sure" that something illegal was afoot when Garrett Paper's prices for corrugated boxes increased during the alleged class period, that she "plain as day told [her] salesman that" Appellants were fixing prices, and that she knew such activity was illegal. International Paper Appellant's Brief at 46-47.

Similarly, Appellants contend that Appellee Oak Valley was also aware of the price increases and allegedly told Stone Container that "you'd better lower your box prices," though Oak Valley is uncertain whether that conversation took place during the class period. International Paper Appellant's Brief at 47. They emphasize that Oak Valley testified that it "accepted the increases in the matter of course and never really questioned it." *Id.* They assert also that although Local Baking now says it had no knowledge during the alleged class period of changes in the average market price for corrugated products, or of any downtime taken by linerboard manufacturers, Local Baking has testified that it was told by Appellant Stone Container that prices were increasing because of a decrease in linerboard. They refer to the testimony of David Halper, president of Alfred I. Halper Corrugated Box Co., Inc., who testified that he was aware of the increased prices that Appellants had charged Halper during the class period, and that he had even complained to Appellants about the increases. Appellants argue that Halper has no greater knowledge today about the existence of a conspiracy than he did during the alleged class period.

Finally, they note that General Refractories sold all of its operating assets in 1994, in the middle of the class period and years before any complaint was ever filed in this case. They state that there were no communications, other than invoices, between Appellants and General Refractories during the class period, and that General Refractories could not identify any facts discovered after the class period that led to filing its complaint, and in particular none that led to the naming of entities other than Stone Container as defendants. International Paper Appellant's Brief at 48-49. And, in contrast to Garrett Paper and Halper, Appellants contend that General Refractories does not appear to have had any suspicion of wrongdoing during the alleged class period based on price increases for corrugated sheets.

To be sure, certain determinations involving the fraudulent concealment defense to the statute of limitations will require individualized proof, which might vary among the assorted Appellees. However, most courts have refused to deny class certification simply because there will be some individual questions raised during the proceedings. In rejecting the rationale in *Broussard,* the Court of Appeals for the First Circuit determined:

> Although a necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Rule 23(b)(3), we reject any per se rule that treats the presence of such issues as an automatic disqualifier. In other words, the mere fact that such concerns may arise and may affect different class members differently does not compel

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It is Appellants' case that the factual complexities relating to these five named plaintiffs underscores the inherently individualized nature of a fraudulent concealment analysis. Appellants insist that the named Appellees would have to prove, among other things: (1) that Garrett Paper's conceded awareness of alleged illegality does not qualify as actual "discovery"; (2) that Garrett Paper's considered inaction in the face of such awareness qualifies as "due diligence"; (3) that Garrett Paper's asserted small size excuses its inaction; (4) that none of the other named Appellees knew or had reason to know about the alleged illegality in the exercise of due diligence, even though some of them complained about the price increases whereas others were not even aware of those increases; (5) that something was "fraudulently concealed" from all putative class members, even though some of them have conceded that they are aware of no more incriminating facts now than they were during the alleged conspiracy; (6) that unique relationships do not affect the due-diligence inquiry; (7) that named Appellees who claimed not to have known of Stone Container's downtime exercised "due" diligence, when such downtime was widely publicized in the industry at the time; (8) that General Refractories, which went out of business in the middle of the class period, is held to a due-diligence standard even after that point; and (9) that alleged oral misrepresentations made to some named Appellees but not others, regarding the reasons for the price increases does not affect the due-diligence analysis. *Id.* at 49-50.

> a finding that individual issues predominate over common ones. As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3). *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.46[3] (3d ed. 1999). Predominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test.

Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000). We accept this reasoning as more persuasive than that espoused by the Court of Appeals for the Fourth Circuit in *Broussard.*

Notwithstanding the individual determinations that will undoubtedly arise at trial, common issues of concealment predominate here because "the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did." *In re Flat Glass*, 191 F.R.D. at 488. Key questions will not revolve around whether Appellees knew that the prices paid were higher than they should have been or whether Appellees knew of the alleged conspiracy among Appellants. Instead, the critical inquiry will be whether "defendants successfully concealed the existence of the alleged conspiracy, which proof will be common among the class members in each class." *Id.*[14] It is the fact of *concealment* that

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[14] See, e.g., *Abramovitz v. Ahern*, 96 F.R.D. 208, 218 (D. Conn. 1982) (issue of whether fraudulent concealment would toll the statute of limitations was common to all class members); *In re Plywood Anti-Trust Litig.*, 76 F.R.D. 570, 586 (E.D. La. 1976) ("fraudulent concealment issues appear to be generally common to all members in each class"); *In re Sugar*, 73 F.R.D. at 348; *In re Fine Paper*, 82 F.R.D. at 154-155 ("The key question on the issue of fraudulent concealment will relate to whether defendants successfully concealed the existence of the alleged conspiracy, and the proof of this contention [what defendants did] will necessarily be common among the class members.").

is the polestar in an analysis of fraudulent concealment. It is the camouflage that demands attention, the cover up, the acts of obscuring or masking. These allegations of proof are all common to the defendants, not the plaintiffs. It is not the conspiracy of the defendant that is relevant on the issue of tolling the statute of limitations, it is the act of concealing the conspiracy.

C.

Moreover, any individualized facts of fraudulent concealment may be adjudicated in the same fashion and at the same time as individual damages issues. As a leading treatise on class actions explains: "Challenges based on the statute of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." NEWBERG & CONTI, NEWBERG ON CLASS ACTIONS § 4.26 (3d ed.)

Many courts faced with similar circumstances have certified class status with the expectation that individual questions concerning fraudulent concealment can be resolved at a later damages phase. *See In re Flat Glass*, 191 F.R.D. at 488 (citing *In re Fine Paper*, 82 F.R.D. at 154-155) ("[B]ifurcation of this litigation into liability and damage segments remains an option if the predominating elements of the question of fraudulent concealment do not prove susceptible to generalized proof."). *See also*, *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 385 (S.D.N.Y. 1996) (Individualized issues raised in fraudulent concealment should be considered when court addresses each putative class member's damage claim.); *Town of New Castle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 43 (S.D.N.Y. 1990) (holding that individualized claims and defenses on statute of limitations issue can be adjudicated in separate determinations of damages).

Accordingly, we hold that common issues of fraudulent concealment predominate.

We have considered all contentions presented by the parties and conclude that no further discussion is necessary.

The judgment of the district court will be affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-8033

IN RE: LINERBOARD ANTITRUST LITIGATION
(MDL No. 1261, D.C. Civil No. 98-cv-05055
& 99-cv-01341)

Stone Container Corporation, et al., Petitioners.

October 5, 2001

Present: MANSMANN, ALITO, and McKEE, Circuit Judges.

1. Petition by Stone Container Corporation, et al., for Permission for Leave to Appeal Pursuant to Rule 23(f) an Order Granting Class Certification, with Appendices and Affidavit in Support.

2. Motion by Stone Container Corporation, et al., to Allow Documents to Be Filed Under Seal Pursuant to District Court Confidentiality Order, which the Court may wish to construe as a Motion to File Appendices and Affidavit in Support of Petition Pursuant to Rule 23(f) Under Seal.

3. Response by Respondents in Opposition to Petition for Permission for Leave to Appeal Pursuant to Rule 23(f) an Order Granting Class Certification, with Appendix in Support.

4. Motion by Respondents to File Response in Opposition to Petition for Permission for Leave to Appeal Pursuant to Rule 23(f) an Order Granting Class Certification and the Supporting Appendix Under Seal.

5. Reply by Petitioners in Support of Petition Pursuant to Rule 23(f) for Allowance of Appeal of Order Granting Class Certification.

6. Motion by Petitioners to Allow Documents to Be Filed Under Seal Pursuant to District Court Confidentiality Order, which the Court may wish to construe as Motion to File Reply in Support of Petition Pursuant to Rule 23(f) Under Seal.

The foregoing petition (1) and motions (2), (4), and (6) are granted.

BY THE COURT:

/s/

Carol Los Mansmann
Circuit Judge

December 18, 2001

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL No. 1261

IN RE: LINERBOARD ANTITRUST LITIGATION

September 4, 2001
As Amended September 10, 2001

DUBOIS, District Judge.

Presently before the Court are two motions for class certification: Corrugated Sheet Plaintiffs' Motion for Class Certification (Document No. 76, filed January 11, 2001) and supporting Memorandum of Law (Document No. 74, filed January 10, 2001), and Corrugated Box Plaintiffs' Motion for Class Certification (Document No. 75, filed January 10, 2001), and related submissions. Oral argument on the Motions was held on August 8, 2001. For the following reasons, Corrugated Sheet Plaintiffs' Motion for Class Certification will be granted, and Corrugated Box Plaintiffs' Motion for Class Certification will be granted.

I. Procedural History

This is an antitrust case involving allegations that several U.S. manufacturers of linerboard[1] engaged in a continuing

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[1] Linerboard includes any grade of paperboard suitable for use in the production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes and for a variety of industrial and commercial

combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The price fixing conspiracy that is the subject of this litigation was the focus of a 1998 complaint by the Federal Trade Commission ("FTC") against Stone Container Corporation ("Stone"). The FTC charged Stone with a unilateral violation of Section 5 of the Federal Trade Commission Act. According to the FTC, Stone had attempted to reduce linerboard inventories and had "invite[d]" some of its competitors to join in a "coordinated price increase." The FTC did not allege that any other manufacturer had accepted Stone's "invitation," nor did it allege the existence of any conspiracy. *See In re Linerboard Antitrust Litigation,* 2000 WL 1475559, *1 (E.D. Pa. Oct. 4, 2000).

Stone and the FTC entered into a consent decree. In doing so, Sone did not admit liability for its alleged unilateral misconduct, and the consent decree has no preclusive effect on Stone in this private party action. *Id.*

Soon after the FTC filed its complaint, three lawsuits were filed in the Northern District of Illinois on behalf of purchasers of corrugated sheets ("Sheets Complaint I"): *General Refractories Co. v. Stone Container Corp.*, Civil Action No. 99-1341 (transferred on Mar. 16, 1999 to E.D. Pa.), and originally No. 98 C 3543 (filed June 8, 1998, N.D. Ill.); *Albert I. Halper Corrugated Box Co. v. Stone Container Corp.*, Class Action No. 99-1396 (transferred on Mar. 19, 1999 to E.D. Pa.), and originally No. 98 C 4659 (filed July 28, 1998, N.D. Ill.); and *Crest Meat Co., Inc. v. Stone Container Corp.*, Civil

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applications. Corrugated sheets are made by gluing a fluted sheet which is not made of linerboard, known as the corrugating medium, between facing sheets of linerboard; corrugated sheets are also referred to as containerboard. The defendants named in the instant lawsuits are major integrated manufacturers and sellers of linerboard, corrugated sheets, and corrugated boxes.

Action No. 99-1397 (transferred on Mar. 19, 1998 to E.D. Pa.), and originally No. 98 C 4612 (filed July 27, 1998, N.D. Ill.). These cases named only Stone as a defendant, but plaintiffs alleged that there were unnamed co-conspirators involved in the antitrust conspiracy, including *inter alia*, Jefferson Smurfit Corp. *See* Sheets Complaint I (all three complaints) at ¶ 9. Together, these plaintiffs are referred to as the Corrugated Sheet Plaintiffs or Sheet Plaintiffs. The Corrugated Sheet Plaintiffs aver in Sheets Complaint I that they were harmed by an industry-wide combination to artificially raise the price of linerboard.

Four other lawsuits were filed against Stone in the Eastern District of Pennsylvania on behalf of purchasers of corrugated boxes in late 1998: *Winoff Industries, Inc. v. Stone Container Corp.*, Civil Action No. 98-5055 (filed Sep. 23, 1998, E.D. Pa.), *Oak Valley Farms, Inc. v. Stone Container Corp.*, Civil Action No. 98-5251 (filed Oct. 2, 1998, E.D. Pa.), *Garrett Paper, Inc. v. Stone Container Corp.*, Civil Action No. 98-5228 (filed Oct. 1, 1998, E.D. Pa.), and *Local Baking Products, Inc. v. Stone Container Corp.*, Civil Action No. 98-5384 (filed Oct. 9, 1998, E.D. Pa.). Together, these plaintiffs are referred to as the Corrugated Box Plaintiffs or Box Plaintiffs. The Corrugated Box Plaintiffs also aver that they were harmed by an industry-wide combination to artificially raise the price of linerboard. The four corrugated box actions in the Eastern District of Pennsylvania were consolidated by stipulation and order dated December 17, 1998 pursuant to Federal Rule of Civil Procedure 42(a).

In late 1998 Stone filed a motion to dismiss Sheets Complaint I—that is, the three lawsuits originally filed against Stone in the Northern District of Illinois on behalf of purchasers of corrugated sheets. On January 8, 1999, Judge Blanche M. Manning of that court denied Stone's motion to dismiss. *See General Refractories Co. v. Stone Container Corp.*, No. 98 C 3543, 98 C 4612 and 98 C 4659, 1999 WL 14498 (N.D. Ill. Jan. 8, 1999). Stone filed a consolidated

answer to the three complaints in the Northern District of Illinois on February 5, 1999. Soon thereafter, on February 12, 1999 the Judicial Panel on Multidistrict Litigation transferred the actions pending in the Northern District of Illinois to this Court for all further pretrial proceedings.

On May 14, 1999 the Corrugated Box Plaintiffs filed the First Amended and Consolidated Class Action Complaint ("Corrugated Box Amended Complaint"). Stone and the following "Non-Stone" Defendants were named in the Corrugated Box Amended Complaint: Jefferson Smurfit Corp., Smurfit-Stone Container Corp., International Paper Co., Georgia Pacific Corp., Weyerhaeuser Paper Co., Temple Inland Inc., Gaylord Container Corp., Union Camp Corp., Simpson Tacoma Kraft Co., Tenneco Inc., Tenneco Packaging, and Packaging Corp. of America. According to the Corrugated Box Amended Complaint, the Non-Stone Defendants accepted Stone's "invitation" to restrict the production of linerboard and artificially raise prices, resulting in an antitrust conspiracy in violation of the Sherman Act.

On May 18, 1999 a separate class action complaint was filed in the Eastern District of Pennsylvania on behalf of purchasers of corrugated sheets ("Sheets Complaint II"). This complaint names eleven of the twelve Non-Stone Defendants identified in the Corrugated Box Amended Complaint.[2] Like the Corrugated Box Amended Complaint, Sheets Complaint II alleges that the named Non-Stone Defendants unlawfully conspired with Stone and each other to artificially raise the price of linerboard.[3]

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[2] Tenneco, Inc. is the sole Non-Stone Defendant that was not named as a party in this complaint.

[3] One of the defendants named in both the Corrugated Box Amended Complaint and Sheets Complaint II, Simpson Tacoma Kraft Co., was dismissed by agreement of all plaintiffs on November 8, 1999. *See* Stipulation of Dismissal in MDL No. 1261 (Doc. 43, filed Nov. 8, 1999). Thus, eleven Non-Stone defendants remain as parties to the Corrugated Box

On September 1, 1999 Stone filed a Motion to Dismiss the Corrugated Box Amended Complaint and for Judgment on the Pleadings with respect to the three complaints collectively referred to as Sheets Complaint I. Also on September 1, 1999, the Non-Stone Defendants filed a Joint Motion to Dismiss the Corrugated Box Amended Complaint and Sheets Complaint II. By Order and Memorandum dated October 4, 2000, these motions were denied. *See In re Linerboard Antitrust Litig.*, 2000 WL 1475559.

By Order dated February 5, 2001, the Court granted the Uncontested Motion of Winoff Industries, Inc. for Voluntary Dismissal, and dismissed all claims of Winoff against all defendants. Similarly, by Order dated February 13, 2001, the Court granted Plaintiff Crest Meat Company, Inc.'s Uncontested Motion for Voluntary Dismissal.

On January 10, 2001, the Corrugated Box Plaintiffs[4] filed their Motion for Class Certification. In their Motion, Box Plaintiffs propose that the Court certify the following class:

> All persons in the United States who purchased corrugated containers directly from any Defendant at any time during the period October 1, 1993 through November 30, 1995, but excluding Defendants, their respective parents, subsidiaries and affiliates and federal, state and local governmental entities and political subdivisions.

Amended Complaint, and ten Non-Stone defendants remain as parties to Sheets Complaint II.

[4] At the time of oral argument, Oak Valley Farms, Inc. ("Oak Valley"), Local Baking Products, Inc. ("Local Baking"), and Garrett Paper, Inc. ("Garrett Paper") remained as Box Plaintiffs.

On January 11, 2001, the Sheet Plaintiffs[5] filed their Motion for Class Certification. In their Motion, Sheet Plaintiffs propose that the Court certify the following class:

> All individuals and entities who purchased corrugated sheets in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities.

Oral argument on both Motions was held on August 8, 2001.

II. Background

This case is grounded on allegations that defendants conspired to restrict the output of linerboard in order to support increases in the price of linerboard with the objective of increasing the price of corrugated sheets and corrugated boxes. Linerboard is the key component in production cost of corrugated sheets and corrugated boxes, and is the primary determinant of the prices of those items. Corrugated Box Amended Complaint at ¶ 36; Sheets Complaint I (all three complaints) at ¶ 20; Sheets Complaint II at ¶ 31.[6] According to plaintiffs, as the cost of linerboard rises, the price of corrugated sheets and boxes rises.

By way of background, plaintiffs allege that in the early 1990s, Stone and other defendants were experiencing financial difficulties. Corrugated Box Amended Complaint at ¶ 38; Sheets Complaint I (all three complaints) at ¶ 23; Sheets

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[5] At the time of oral argument, General Refractories Co. ("General Refractories") and Albert O. Halper Corrugated Box Co. ("Halper") remained as Sheet Plaintiffs.

[6] The Court notes that the Corrugated Box Amended Complaint, Sheets Complaint I, and Sheets Complaint II contain substantially similar allegations. For completeness, citations will be to all Complaints, where appropriate.

Complaint II at ¶ 34. In early 1993, Stone unsuccessfully attempted to increase the price of linerboard, Corrugated Box Amended Complaint at ¶ 39, as part of an overall effort to increase the price of corrugated sheets and containers. Sheets Complaint II at ¶ 35. Plaintiffs allege that Stone believed the failure of that price increase resulted from excess inventory of linerboard, creating a substantial industry-wide imbalance of supply over demand. Corrugated Box Amended Complaint at ¶ 40; Sheets Complaint II at ¶ 35.

According to plaintiffs, Stone devised a strategy to invite its competitors to increase the price of linerboard. As part of this strategy, Stone planned to take downtime at its plants to reduce its production and inventory of linerboard substantially, and contemporaneously to purchase substantial amounts of linerboard from competitors—actions which, plaintiffs allege, were extraordinary, and not in the regular course of business. Corrugated Box Amended Complaint at ¶ 41, Sheets Complaint I (all three complaints) at ¶ 27; Sheets Complaint II at ¶ 37(c).

In mid-1993, Stone advised its competitors that it intended to take linerboard mill downtime and draw down industry inventory levels of linerboard, and stated its belief that these actions would support a price increase. Plaintiffs aver that the purpose of Stone's communications with other manufacturers was to coordinate industry-wide restrictions on output and price increases. Thereafter, on July 7, 1993, Stone announced that it was taking downtime of approximately 180,000 tons of containerboard [linerboard plus medium] by shutting six of its mills for varying periods of time.[7] Ex. E to Corrugated Box Plaintiffs' Motion for Class Certification. Shortly thereafter, "other industry companies followed and up to 500,000 tons were announced to be removed." Ex. F to Corrugated Box Plaintiffs' Motion for Class Certification. As a result of these

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[7] Defendants concede that the downtime was taken at mills producing linerboard.

communications, the major manufacturers of linerboard began to take production downtime at a time when demand in the industry was increasing. Corrugated Box Amended Complaint at ¶¶ 42-45; Sheets Complaint II at ¶¶ 37(d)-(f).

In August 1993, Stone implemented the first of a series of price increases for linerboard which was joined by virtually every major manufacturer. Plaintiffs aver that subsequently, pursuant to an understanding, the major manufacturers continued their pattern of taking substantial downtime and implementing price increases.

The concerted actions of the defendants in taking downtime at the mills producing linerboard, and then increasing the price of linerboard, resulting in price increases for corrugated sheets and corrugated boxes, forms the basis of the conspiracy at issue in this case. As a result of this conspiracy, plaintiffs claim that prices for linerboard, corrugated sheets and corrugated containers were artificially raised, fixed, and stabilized. Corrugated Box Amended Complaint at ¶¶ 47-50, 52; Sheets Complaint I at ¶¶ 27-28; Sheets Complaint II at ¶ 37(*i*). During the proposed class period, it is alleged that there were at least seven coordinated price increases of corrugated sheets. Sheets Complaint II at ¶ 37(j).

III. Standard for Class Certification

A class action suit is appropriate when the "issues involved are common to the class as a whole." *Califano v. Yamasaki,* 442 U.S. 682, 701 (1979). Under those circumstances, the certification of a class may both promote judicial economy and save resources for parties who may otherwise repeatedly litigate the same issue. *See id.*

For the Court to certify a plaintiff class, plaintiffs must satisfy the four prerequisites for a class action set forth in Federal Rule of Civil Procedure 23(a) and the requirement of Rule 23(b)(3).

The four elements of Rule 23(a) are:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These four elements are often referred to as "'numerosity', 'commonality', 'typicality', and 'adequacy of representation,' respectively." *See Hanrahan v. Britt,* 174 F.R.D. 356, 361 (E.D. Pa. 1997). "'[C]ommonality' like 'numerosity' evaluates the sufficiency of the class itself, and 'typicality' like 'adequacy of representation' evaluates the sufficiency of the named plaintiff[s] * * *." *Hassine v. Jeffes,* 846 F.2d 169, 176 n.4 (3d Cir. 1988).

Plaintiffs must also establish that the putative class action meets the requirements of Rule 23(b)(3):

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

IV. Discussion

A. The Four Elements of Rule 23(a)

1. Numerosity

Satisfaction of the first prerequisite, numerosity, does not require evidence of the exact number or identification of the members of the proposed class, but rather that the proposed class is so "numerous that joinder of all members is impracticable." *See Hanrahan,* 174 F.R.D. at 362 (citing Fed. R. Civ. P. 23(a)(1)). In determining whether a proposed class meets the numerosity requirement, "a court may accept common sense assumptions." *In re Cephalon Securities Litigation,* 1998 WL 470160, *2 (E.D. Pa. Aug. 12, 1998).

Both Box Plaintiffs and Sheet Plaintiffs maintain that while the exact number of putative class members cannot be ascertained at the present time, there are thousands of potential class members so numerous and geographically dispersed that joinder of all members is impracticable. Corrugated Box Amended Complaint at ¶ 28; Sheets Complaint I at ¶ 11; Sheets Complaint II at ¶ 22. Defendants have not disputed that the classes meet the numerosity requirement. The Court concludes based on the evidence presented that the plaintiffs' proposed classes meet the numerosity requirement of Rule 23(a)(1).

2. Commonality

Rule 23(a)(2) requires the existence of questions of law or fact common to the class. This requirement is easily met because it may be fulfilled by a single common issue. *See Baby Neal ex rel. Kanter v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994). "Courts interpreting the commonality requirement in the antitrust area have held that 'allegations concerning the existence, scope and efficacy of an alleged conspiracy present questions adequately common to class members to satisfy the commonality requirement.'" *In re Flat Glass Antitrust Litig.,* 191 F.R.D. 472, 478 (W.D. Pa. 1999) (citing 4 Hubert

Newberg and Alba Conte, *Newberg on Class Actions*, § 18.05, at 18-15 (3d ed. 1992)). *See, e.g., Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977) ("The district was correct in concluding that this question [existence of a conspiracy] is one common to the class."); *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 247 (S.D. Tex. 1978). In this case plaintiffs will be required to establish the existence of a conspiracy to fix, raise, maintain and stabilize the price of linerboard. *See In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 150 (E.D. Pa. 1979).

The Sheet Plaintiffs have identified eight questions of law and fact common to all members of the Sheet Plaintiffs' class:

> (a) whether the defendants and their co-conspirators engaged in a combination or conspiracy to raise, fix, maintain and stabilize prices of corrugated sheets sold in the United States;
>
> (b) the duration and extent of the alleged combination or conspiracy;
>
> (c) whether the defendants and their co-conspirators were participants in the alleged combination or conspiracy;
>
> (d) whether the alleged combination or conspiracy violated Section 1 of the Sherman Act;
>
> (e) whether the defendants and/or their co-conspirators took affirmative steps to conceal the alleged combination or conspiracy;
>
> (f) the effect of the alleged combination or conspiracy upon the prices of corrugated sheets sold in the United States during the proposed class period;
>
> (g) whether the conduct of the defendants and their co-conspirators, as alleged in Sheets Complaint I and Sheets Complaint II, caused injury to the business or property of the named plaintiffs and the other members of the proposed class; and

(h) the appropriate measure of damages sustained by the named plaintiffs and other members of the proposed class.

Sheets Complaint I (all three complaints) at ¶ 14; Sheets Complaint II at ¶ 25.

The Box Plaintiffs have identified nine questions of law and fact common to all members of the Box Plaintiffs' class, similar in substance to those of the Sheet Plaintiffs:

(a) whether defendants conspired with each other, other co-conspirators, and others to fix, raise, stabilize or maintain the prices for linerboard;

(b) the scope and extent of the conspiracy;

(c) whether the alleged conspiracy to fix the price of linerboard had an effect on prices paid by members of the proposed class for corrugated containers during the proposed class period;

(d) the identity of each member of the alleged conspiracy;

(e) the time period during which the conspiracy existed;

(f) whether defendants' alleged combination, agreement or conspiracy violated Section 1 of the Sherman Act;

(g) whether Box Plaintiffs and other members of the proposed class are entitled to declaratory or injunctive relief;

(h) the appropriate measure of damages sustained by the named plaintiffs and other members of the proposed class; and

(*i*) whether defendants and their co-conspirators affirmatively and fraudulently concealed the alleged conspiracy.

Corrugated Box Amended Complaint at ¶ 32.

"Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy." *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 335 (E.D. Pa. 1976). Whether defendants participated in the actions alleged is a common question. *See, e.g., Hanrahan*, 174 F.R.D. at 363 (whether defendants, *inter alia*, systematically made fraudulent misrepresentations or negligent misrepresentations in connections with the promotion of distributorships is common question); *In re Sugar Indus.*, 73 F.R.D. at 335-36 (whether defendants, *inter alia*, "combined and conspired to establish artificially the basis price and effective selling price of refined sugar" is a common question). Further, defendants have not disputed that plaintiffs can establish the commonality requirement.

Considering all of plaintiffs' allegations, the Court concludes there are significant questions of law and fact common to both classes. Thus the commonality requirement is met.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Typicality asks whether the named plaintiffs' claims are typical, in common- sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class." *Baby Neal,* 43 F.3d at 55. In evaluating typicality, the Court should consider whether "the named plaintiff's individual circumstances are markedly different or * * * the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Eisenberg*, 766 F.2d at 786. A finding of typicality will generally not be precluded even if there are "pronounced factual differences" where there is a strong similarity of legal theories. *See, e.g., In re Resource America Sec. Litig.*, 202 F.R.D. 177 (E.D. Pa. 2001); *In re Cephalon*

Sec. Litig., 1998 WL 470160, at *2 (citing *Baby Neal*, 43 F.3d at 58). "In antitrust disputes '[s]ince the representative parties need prove a conspiracy, its effectuation, and damages therefrom—precisely, what the absentees must prove to recover—the representative claims can hardly be considered atypical.'" *In re Sugar Indus.*, 73 F.R.D. at 336 (quoting *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 567 (D. Minn. 1968)). Moreover, "in instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members." *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss. 1993).

In the case before the Court, plaintiffs' claims arise from the same allegedly illegal practices and course of conduct that underlie the claims of the proposed classes, namely, defendants' conspiracy to raise, fix, maintain or stabilize prices for linerboard by reducing production and, as a necessary result, to raise, fix, maintain or stabilize prices for corrugated sheets and containers. In their Joint Memorandum of Law in Opposition to the Corrugated Sheet and Corrugated Box Plaintiffs' Motions for Class Certification, defendants do not directly challenge the typicality prong. Rather, in challenging the third prong, adequacy of representation, they note that "the final three requirements of Rule 23(a) 'tend to merge,' with commonality and typicality 'serv[ing] as guideposts for determining whether * * * maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)) (alterations in original).

Where appropriate, the Court will consider defendants' arguments with respect to typicality when it considers the

adequacy prong. Suffice it to say at this point in this Memorandum that the Court concludes the factual circumstances and legal claims of the named plaintiffs will not significantly differ from the claims of the other members of the proposed classes. Therefore, the typicality prong is satisfied.

4. Adequacy of Representation

The adequacy of the class representative is dependant on satisfying two factors: 1) that the plaintiffs' attorney is competent to conduct a class action; and 2) that the class representatives do not have interests antagonistic to the interests of the class. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 800-01 (3d Cir. 1995); *Rendler v. Gambone Bros. Dev. Co.*, 182 F.R.D. 152, 159 (E.D. Pa. 1998); *In re Resource America Sec. Litig.*, 202 F.R.D. 177. Defendants do not challenge the qualifications of plaintiffs' counsel and the Court finds them to be well qualified. Defendants do, however, argue that the named plaintiffs are not adequate class representatives for a variety of reasons. Insofar as these arguments impact the predominance requirement of Rule 23(b)(3), the Court recognizes that

> the standards for measuring the predominance of common issues under Fed. R. Civ. P. 23(b)(3) should not be imputed to adequacy of representation. That is to say, the reasons for denying certification under the predominance standard may not necessarily compel denying certification under 23(a)(4), because the predominance requirement is more stringent than commonality and typicality.

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 185-86 (3d Cir. 2001) (footnotes omitted). The Court will address each argument in turn.

a. Lack of Purchases from Non-Stone Defendants

Defendants argue that, with only one exception, since no named plaintiff purchased any corrugated products during the proposed class period from any defendant other than Stone, the named plaintiffs have no incentive to pursue the claims of those potential class members who purchased from the Non-Stone Defendant manufacturers.[8] Specifically, defendants note that of the named plaintiffs, the only purchases made from a Non-Stone Defendant were Garrett Paper's purchases of pizza boxes from Gaylord Container Corp during the first five weeks of the proposed class period. *See* Affidavit of Professor Franklin M. Fisher, filed March 2, 2001 ("Fisher Aff."), Exs. 7, 8. They argue that because the plaintiffs, for the most part, only purchased from Stone, they have no reason to develop and prove a case against any of the other defendants.

Plaintiffs state in response that they need not have purchased from all defendants to satisfy the adequacy requirement, and the Court agrees. In *Bogosian*, the Third Circuit held that the "fact that a customer has not made purchases from every co-conspirator does not prevent him from suing all—for each co-conspirator contributed to the charging of the supracompetitive price paid by the purchaser." *Bogosian*, 561 F.2d at 448. In

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[8] Insofar as this argument relates to the typicality of plaintiffs' claims, the defendants' arguments are not persuasive.

> The fact that the purchases were not made from all of the defendants, or that all of the methods through which the conspiracy was allegedly effected were not utilized against the named plaintiffs is not dispositive of their ability to represent the class. Nor will differing damages, resulting from varied methods of procuring and purchasing the product, defeat satisfaction of Rule 23(a)(3).

In re Potash Antitrust Litig., 159 F.R.D. 682, 691 (D. Minn.1995) (quoting *In re Workers' Compensation*, 130 F.R.D. 99, 106 (D. Minn. 1990)) (internal citations and quotations omitted).

fact, because antitrust law "provides for joint and several liability of co-conspirators, each Plaintiff will have an equal incentive to generally prove the Defendants' participation in the alleged conspiracy." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 519 (S.D.N.Y. 1996). Since plaintiffs are alleging a conspiracy to restrict the supply of linerboard, resulting in increases in the prices of linerboard and corrugated products, they must necessarily show that Stone conspired with the other defendants. *See, e.g., United States v. McGlory*, 968 F.2d 309, 321 (3d Cir. 1992) (the elements of conspiracy are "a 'unity of purpose,' intent to achieve a common goal, and an agreement to work together toward that goal") (citing *United States v. Wexler*, 838 F.2d 88, 90-91 (3d Cir. 1988)).

Accordingly, the Court concludes that plaintiffs have an incentive to prove a case against all defendants. It is in plaintiffs' interest to maximize potential recovery against all defendants and to demonstrate the full extent of the alleged conspiracy.

b. Timing, Location, and Amount of Purchases

Defendants argue that the timing of the named plaintiffs' purchases distort their incentives in pursuing the case. On that issue they say that because not all of the plaintiffs made purchases during the entire proposed class period, plaintiffs' incentives to pursue the case will be antagonistic to each other, and to other potential class members. In essence, defendants contend that each plaintiff will want to show that the period in which it purchased corrugated products was the period most effected by the conspiracy. They argue that an individual plaintiff has no incentive to show that the conspiracy had any effect on a time period in which it did not purchase corrugated products.

Specifically, defendants point to the following evidence of purchases by the Box Plaintiffs: Local Baking did not purchase any products from Stone between September 1993

and May 1994. Oak Valley made no purchases in the first five months of the proposed class period.[9] Garrett Paper made most of its purchases after the "critical initial months" of the alleged conspiracy.[10] As to the Sheet Plaintiffs, defendants argue that General Refractories made no purchases after May 1994 and Halper stopped purchasing from Stone in 1995.

Plaintiffs contend that defendants allegations and evidence do not make the interests of the named plaintiffs antagonistic to the interests of each other or the proposed classes, and the Court agrees. It is well settled that a named plaintiff need not have made purchases from the defendants throughout the class period. *See, e.g., Paper Sys. Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 610 (E.D. Wis. 2000) (certifying class in an antitrust price-fixing action against the sellers of heat-sensitive facsimile paper where one of three named plaintiffs purchased thermal facsimile paper from defendants for part of the class period); *In re Wirebound Boxes Antitrust Litig.*, 128 F.R.D. 268, 269-70 (D. Minn. 1989) (certifying 28-year class period where four of five named plaintiffs did not purchase boxes throughout the entire class period). Moreover, there is evidence that some of the plaintiffs did in fact purchase from Stone throughout the entire class period. *See* notes 9 & 10, *supra*. To the extent that these issues involve disputed issues of fact, the Court will address them at an appropriate time later

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[9] Plaintiffs submitted a computer printout showing Oak Valley made multiple purchases from Stone between October 1, 1993 and February 28, 1994, the first five months of the proposed class period. Ex. Q, attached to Box Plaintiffs' Reply Memorandum in Support of Class Certification (Doc. 90).

[10] Defendants submitted a chart which shows that Garrett Paper purchased $25,085 worth of boxes from Stone between October 1, 1993 and December 31, 1993, $67,248 worth of boxes from Stone in 1994, and $20,397 worth of boxes from Stone from January 1, 1995 to November 30, 1995. Fisher Aff. Ex. 6. This evidence runs counter to defendants' contentions concerning the timing of Garrett Paper's purchases.

in the proceedings. *See In re Glassine and Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 304 & n.1 (E.D. Pa. 1980).

Defendants also argue that the geographical location of plaintiffs' purchases makes the named plaintiffs unrepresentative of the proposed classes. They contend that, since plaintiffs have provided no evidence that prices for corrugated sheets and boxes were uniform across the country, or that they were immune from local-market forces that would mitigate or eliminate any impact from defendants' alleged actions, and with the exception of General Refractories, plaintiffs' purchases were made in local markets, plaintiffs have no reason to press claims on behalf of purchasers in other areas of the country. Moreover, defendants argue that the named plaintiffs are unrepresentative of the proposed classes because, unlike the named plaintiffs which were spot purchasers, many class members purchased corrugated products under long term contracts.

The plaintiffs produced evidence at oral argument—two charts from Dr. John C. Beyer's expert report dated January 9, 2001—that regional prices for corrugated products, while not identical, followed very similar price movements. *See* Affidavit of John C. Beyer, Ph.D., Regarding Class Certification, dated Jan. 9, 2001, attached to Corrugated Box Plaintiffs' Motion for Class Certification ("Beyer Aff.") charts 1 & 3. Otherwise stated, when prices for linerboard and corrugated products increased in one area of the country, they went up in the rest of the country as well. This regional differentiation in pricing does not cause plaintiffs to have interests antagonistic to members of the classes from different regions—they still have the same incentives to prove a nation-wide conspiracy.

It is not clear from defendants' submissions just how they conclude the amount of plaintiffs' purchases impact on this class certification decision. At one point, defendants say that they "do not challenge the right of a small, local purchaser to bring a case." They then argue that "it is not fair to the

members of the proposed class, or to Defendants for that matter, to allow companies that purchased a smattering of the relevant products at various times over a 25-month period from one Defendant to litigate claims on behalf of thousands of companies whose purchases, and hence their interests in recovering on claims against Defendants, do not resemble those of the named plaintiffs." Defendant's Joint Memorandum of Law in Opposition (Document No. 85) at 11-12. Regardless, the Court concludes that the amount of plaintiffs' purchases does not make plaintiffs inadequate representatives.

In *Hedges Enterprises, Inc. v. Continental Group, Inc.*, 81 F.R.D. 461 (E.D. Pa. 1979), the court allowed a relatively small purchaser of consumer bags to represent a class consisting primarily of "Fortune 500" companies, which purchased large quantities of consumer bags. 81 F.R.D. at 466. It is "generally recognized that 'the mere fact that a representative plaintiff stands in a different factual posture is not sufficient to refuse certification * * * [t]he atypicality or conflict must be clear and must be such that the interests of the class are placed in significant jeopardy.'" (citing *Sley v. Jamaica Water & Util., Inc.*, 77 F.R.D. 391, 394-95 (E.D. Pa. 1977)) (modifications in original). *See also In re Glassine*, 88 F.R.D. at 304 ("defendants' argument that their claims are not typical of those of purchasers of large volumes of non-standardized products is not convincing"). There is nothing in the record before the Court related to the allegedly small amount of purchases made by the named plaintiffs in comparison to the large amount of purchases by other companies which comprise the proposed classes that would suggest any conflict or that the interests of the classes would in any way be jeopardized.

Defendants rely on *In re Milk Products Antitrust Litigation*, 195 F.3d 430 (8th Cir. 1999), for the proposition that a named plaintiff is not an adequate representative when, *inter alia*, it made only small purchases at list prices, where the purported

class included larger purchasers which bought on different terms. In that case, Rainy Lake One Stop, Inc. ("Rainy Lake"), a small convenience store located in northernmost Minnesota, sought to be the sole class representative in a state-wide suit alleging price-fixing of milk. *See id.* at 432-35. The Eighth Circuit affirmed the denial of class certification for two reasons—lack of standing and failure of Rainy Lake to meet the typicality and adequacy requirements of Rule 23. *See id.* at 436-37. In so holding the court noted with respect to typicality and adequacy that there was evidence of three regional milk markets in Minnesota, and that any evidence of a conspiracy in the geographic area in which Rainy Lake was located would not necessarily translate into evidence of a conspiracy in other regions of the state. *See id.* at 436. Secondly, because Rainy Lake only made small wholesale purchases at list price, there were questions as to whether it had a sufficient incentive to represent class members whose purchases were made at "cost-plus formula prices unrelated to defendants' list prices." *Id.* at 437. Thirdly, Rainy Lake lacked the desire to vigorously pursue the interests of other class members as it only sought to represent small convenient stores, rather than "very large grocery stores" and "convenience store chains." *Id.* None of these factors by themselves were determinative; rather, in addition to Rainy Lake's lack of standing, the Eighth Circuit held that taken as a whole, these factors defeated typicality and adequacy.

The case at bar does not present the same obstacles to class certification that were faced in *In re Milk Products*. First, the named plaintiffs are from multiple locations throughout the country—among the Box Plaintiffs, Oak Valley is a South Dakota corporation with its principal place of business in Watertown, South Dakota, Corrugated Box Amended Complaint ¶ 7, Garrett Paper is a Missouri corporation with it principal place of business in St. Louis, Missouri, *id.* at ¶ 7, and Local Baking is a New Jersey corporation with its principal place of business in Newark, New Jersey, *id.* at ¶ 9, and,

among the Sheet Plaintiffs, General Refractories is a Pennsylvania corporation with its principal place of business in Bala Cynwyd, Pennsylvania, Sheets Complaint II ¶ 5, and Halper is a Minnesota corporation with its principal place of business located in Minnesota, *id.* at ¶ 6. They can adequately present claims of a nationwide conspiracy, and have incentives to do so.

Additionally, the problem that some plaintiffs made "spot" purchases while other members of the proposed classes had long term contracts can be remedied by changing the definition of the classes to exclude purchasers who had contracts which could not have been affected by the alleged conspiracy—purchasers with contracts not tied to the price of linerboard.[11] Finally, plaintiffs have shown an interest in vigorously pursuing the claims of all effected parties, in contrast to Rainy Lake, the plaintiff in *In re Milk Products.*

Moreover, many courts have certified classes akin to the proposed classes in this case. For example, the court in *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex. 1978) certified a class consisting of all persons who "purchased corrugated containers or corrugated sheets," *id.* at 245, even though they "tend to be made and sold in small geographical areas [and] * * * [c]osts of labor, paper, energy, etc., vary from one area to another, so that the final cost of the same box may vary from one part of the country to another." *Id.* at 246. In certifying a class in *In re Glassine and Greaseproof Paper Antitrust Litigation*, the court concluded that there is no "significance in the fact that plaintiffs purchased at list prices, whereas volume buyers negotiated

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[11] At oral argument, the issue of whether some contracts had, as a term, the price of the products tied to something which could not have been affected by the alleged conspiracy was discussed in connection with the predominance prong of Rule 23(b)(3). The Court will address this argument, *infra*, in § IV.B.1.d.

their prices. Plaintiffs allege that prices were set at non-competitive levels: such market conditions would affect the prices paid by both types of purchasers, and their interests would be congruent." 88 F.R.D. at 305. Likewise, the Third Circuit, in *Bogosian*, found two local gasoline dealers appropriate representatives for a class of thousands of dealers of sixteen companies disbursed throughout the United States. *See* 561 F.2d at 449.

The named plaintiffs are not inadequate class representatives because of the timing, location, and amount of their purchases. They do not have interests antagonistic to each other or to the proposed classes; rather, as they must offer common proof to establish the conspiracy, their interests are aligned. The Court will next turn to defendants' argument that plaintiffs are subject to unique defenses.

c. Unique Defenses

The defendants argue that class certification should be denied because claims of the named plaintiffs are subject to unique defenses—the statute of limitations and the ability of some plaintiffs to pass through any price increase of corrugated products to customers. With respect to the statute of limitations defense, they contend that Garrett Paper's president suspected that Stone was "fixing prices" throughout the class period, and voiced this concern to Stone's sales representative, and that, as a consequence, defendants have a statute of limitations defense as to Garrett Paper. Further, defendants argue that Local Baking and Oak Valley, because they are "small entities with comparatively limited purchases," might be able to avoid the statute of limitations defense which could be applicable to large, multi-national corporations. They also make statute of limitations arguments against General Refractories, stating it stopped making purchases eight months

into the proposed class period,[12] and Halper, namely, that it was sensitive to, and "well aware" of the prices paid.

In some circumstances, a plaintiff who is subject to unique defenses might not be deemed an appropriate class representative. *See Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (sole named plaintiff subject to unique defenses including *res judicata*). "Where it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative." *Koos v. First Nat. Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974). However, when that unique defense is the statute of limitations, "whether one of the named plaintiff's claims is time-barred is a disputed issue inappropriate for adjudication at the class certification stage. While the statute of limitations defense may ultimately affect an individual's right to recover, it does not affect the presentation of the liability issues for the plaintiffs' class." *Cullen v. Whitman Med. Corp.*, 188 F.R.D. 226, 230 (E.D. Pa. 1999) (citing *Gruber v. Price Waterhouse*, 117 F.R.D. 75, 80 (E.D. Pa. 1987); *Rishcoff v. Commodity Fluctuations Sys. Inc.*, 111 F.R.D. 381, 382 (E.D. Pa. 1986)).

The Court concludes that the unique statute of limitations defenses identified by defendants does not affect the presentation of the liability issues for plaintiff classes. *See Cullen*, 188 F.R.D. at 230-31. There is no reason to believe that any of the named plaintiffs will be "distracted by a relatively unique personal defense." *Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 173 (E.D. Pa. 1979) (citing *Koos*, 496 F.2d at 1165).

Defendants also argue that Halper is an inadequate class representative because of its ability to pass through any increased costs of corrugated products to the ultimate

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[12] Timing of purchases was addressed *supra*, in § IV.A.4.b.

purchasers. The ability to pass on costs is no bar to class certification. In fact, "[s]atisfaction of the impact requirement can be met by evidence that the alleged conspiracy resulted in overcharges that were 'passed-on,' at least in part, to all claimants." *In re Sugar Indus.*, 73 F.R.D. at 346 (citing *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1969); *In re Ampicillin Antitrust Litig.*, 55 F.R.D. 269 (D.D.C. 1972); *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968)). In a price fixing action, each member of the class does not need to prove "that he absorbed at least some portion of the alleged overcharges as an essential liability element before reaching the damage question." *In re Sugar Indus.*, 73 F.R.D. at 346 (citing *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 200-01 (9th Cir. 1973) (holding in passing-on cases, the proper stage for looking at the apportionment of damages is the damages stage, as "the intermediary should recover the amount of the overcharge that was not passed on * * * and any lost profits resulting from increased costs.")).

A more thorough inquiry into this passing-on argument is best suited for a later stage of the litigation. On the present state of the record, the Court concludes defendants' unique defenses argument does not adversely affect the adequacy requirement of Rule 23(a)(4).

d. Lack of Knowledge of the Litigation

Defendants attack each named plaintiff's ability to serve as an adequate class representative because, *inter alia,* they do "not know the timing or purpose of the Defendants' alleged conspiracy or any Defendants' role," they have not followed the litigation closely, and do not know the details of various aspects of the case. The Court does not agree.

For example, among the named Box Plaintiffs, Local Baking's representative, Joseph Aihini, although he mischaracterized the class he seeks to represent as "persons or businesses that have purchased linerboard," evidenced

sufficient knowledge of the facts of the case. He also stated that he had spoken with his attorneys "many times." Deposition of Joseph Aihini, Feb. 27, 2001 at 149-177. While Lisa Garrett, president of Garrett, did not show a detailed knowledge of the allegations in this case, her deposition did reflect that she fully understands the role of a class representative and has been involved with counsel. Deposition of Lisa Garrett, Feb. 13, 2001. In his deposition, Richard Rogers, General Manager at Oak Valley, testified that he did not know the procedural posture of the case, the role of each individual defendant, or "when the conspiracy was adopted." Deposition of Richard Rogers, Feb. 15, 2001. However, he understood "that there was a collusion among a number of companies to set the price of linerboard during a period of time which affected us and others." *Id.* at 6. The named Box Plaintiffs are all adequate class representatives, and will be allowed to serve as such.

As for the named Sheet Plaintiffs, defendants argue that General Refractories' general counsel, Barry Katz, does not have sufficient knowledge of the facts of the case. In his deposition, Mr. Katz stated that he did not know in what manner General Refractories used corrugated sheets or boxes. Deposition of Barry L. Katz, Feb. 8, 2001, at 91. He also did not have any knowledge of the price trends of corrugated products during the class period. *Id.* at 130-31. However, he stated that he had a "general understanding" that the defendants "conspired to set prices for sheets." *Id.* at 160. His knowledge was "limited to what's alleged in the Complaint and the Amended Complaint." *Id.* at 173.

"Antitrust plaintiffs must show an interest in the litigation but need not have extensive personal knowledge of the facts tending to prove a conspiracy in order to be adequate representatives." 4 *Newberg on Class Actions* § 18.20. *See also In re Glassine & Greaseproof Paper*, 88 F.R.D. at 305 n.3 ("[C]lass representatives in complex cases of this nature are not usually required to have first-hand knowledge of the facts

needed to establish their claims."); *In re Cephalon Sec. Litig.*, 1998 WL 470160, at *3 ("[T]he class representative's complete understanding of the legal basis for the claims is not required by Rule 23.") (citing *Barnes v. American Tobacco Co.*, 176 F.R.D. 479, 486 (1997)). "[I]t is unrealistic to require a class action representative to have an in-depth grasp of the legal theories of recovery behind his or her claim. It is more important that the representative actively seeks vindication of his or her rights and engages competent counsel to prosecute the claims." *In re Cephalon*, 1998 WL 470160, at *3 (citing *Barnes*, 176 F.R.D. at 486). *See also In re Resource America*, 202 F.R.D. at 186-87.

For example, this Court has ruled that what is required with respect to adequacy of representation is that a named plaintiff has "a basic understanding of the allegations made in the case, and what law is alleged to have been violated, and that he would be willing to contest an action by his attorneys with which he did not agree." *In re Resource America*, 202 F.R.D. at 186-87. In *Lewis v. Curtis*, 671 F.2d 779 (3d Cir.1982), *recognized as superceded on other grounds*, *Garber v. Lego*, 11 F.3d 1197, 1206-07 (3d Cir. 1993), the Third Circuit held that a plaintiff who "displayed a complete ignorance of facts concerning the transaction that he was challenging" was able to represent the interests of other shareholders. *Lewis*, 671 F.2d at 789. "The adequacy-of-representation test is not concerned whether plaintiff personally derived the information pleaded in the complaint or whether he will personally be able to assist his counsel." *Id.* Upon reviewing the depositions of the various plaintiffs' representatives, the Court concludes that all named Sheet Plaintiffs are more involved and knowledgeable than the plaintiff in *Lewis*.

e. Lack of Financial Resources

Finally, defendants argue that Halper does not have the financial wherewithal to prosecute the case. They state that under *Apanewicz v. General Motors Corp.*, 80 F.R.D. 672 (E.D. Pa. 1978) and *Rolex Employees Retirement Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658 (D. Or. 1991) the law requires a named plaintiff to have the financial resources to pay for the litigation costs. In *Apanewicz,* the Court declined to certify a class because, *inter alia,* the named plaintiff did not have the financial resources to prosecute the case. *See* 80 F.R.D. at 679-80. The portion of *Rolex Employees* which dealt with a potential named plaintiff's financial resources was primarily concerned with "attorneys hav[ing] free reign over the prosecution of the action." *Rolex,* 136 F.R.D. at 666.

Plaintiffs argue that *Apanewicz* is outdated because it was decided before Rule 1.8(e) of the Pennsylvania Rules of Professional Conduct were passed. That Rule provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

Plaintiffs' position on this issue is supported by *Kline v. First Western Gov't Sec., Inc.*, 1996 WL 153641, *11 (E.D. Pa. Jan. 24, 1996). Further, the Court notes that the named plaintiffs in a class action need not assume responsibility for all expenses since it is the entire class that may benefit from successful litigation. *See Kline*, 1996 WL 153641, *11 (citing *Rand v. Monsanto Co.*, 926 F.2d 596, 600 (7th Cir. 1991)).

There is no allegation that General Refractories does not have the financial resources to prosecute this case, and assuming *arguendo* that is a requirement, having one named plaintiff with those resources is sufficient. Moreover, the Court is

satisfied that the attorneys do not have free reign over the prosecution of the action.

B. The Two Elements of 23(b)(3)

Once the four elements of Rule 23(a) have been satisfied, plaintiffs must satisfy the two prongs of Rule 23(b)(3). First, plaintiffs must show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Secondly, plaintiffs must show that "a class action is superior to other available methods for the fair an efficient adjudication of the controversy." *Id.*

At the outset, the Court notes that there is an overlap between the predominance requirement of Rule 23(b)(3) and the prerequisite of Rule 23(a)(2) that common questions exist. "The courts have repeatedly focused on the liability issues, in contrast to damage questions, and, if they found issues were common to the class, have held that Rule 23(b)(3) was satisfied." 4 *Newberg on Class Actions*, § 18-26.

To prevail on a price-fixing conspiracy claim, plaintiffs must prove three elements: (1) that defendants violated antitrust laws; (2) the fact of damage, also called impact, of the unlawful activity; and (3) the amount of damages sustained because of the unlawful activity. *See Lumco Indus., Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 172 (E.D. Pa. 1997); *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374, 381 (S.D.N.Y. 1996). On a motion for class certification, it is plaintiffs' burden to establish that common or generalized proof will predominate at trial with respect to these essential elements of their antitrust claim. *See In re Industrial Diamonds*, 167 F.R.D. at 381; *In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, *5 (E.D. Pa. Mar. 20, 1998) ("In a price-fixing antitrust class action, plaintiffs must establish that both the defendants' violations of law and the impact of those violations on the class members involve predominantly common issues. Plaintiffs must therefore make a threshold

showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." (internal citations omitted)).

1. Predominance

"Predominance measures whether the class is sufficiently cohesive to warrant certification." *Newton*, 259 F.3d at 186-87 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Defendants make two main arguments that class certification is not warranted because individualized issues predominate. First, they argue that the plaintiffs advance a unique and complicated conspiracy theory that distinguishes this case from the traditional antitrust cases. Secondly, they contend that plaintiffs cannot prove class wide impact.

a. Plaintiffs' Conspiracy Theory Does Not Preclude Predominance

Defendants argue that plaintiffs' conspiracy theory is different from the "traditional" price-fixing conspiracy in four respects: first, plaintiffs did not buy linerboard—the product which is the target of the alleged conspiracy; second, plaintiffs do not allege that defendants actually fixed the price of linerboard, and instead they restricted supply; third, plaintiffs' theory relies on market forces of supply and demand; and, fourth, plaintiffs contend that the impact on the prices of sheets and boxes was felt for several years after the alleged misconduct. In short, defendants contend that "it is simply too difficult to prove common impact on a class-wide basis in an indirect, curtailment-of-supply case."

At oral argument, defendants explained that, in their view, a "traditional" price-fixing conspiracy involves a proximity of the buyers and sellers, that is, the buyers and sellers are all in the same market. Hr'g Tr. at 79. They contrasted that situation to this case which they characterize as having one market for linerboard, a second for corrugated sheets, and a third for corrugated containers. Hr'g Tr. at 80. In defendants' view,

plaintiffs' allegations that there is a correlation between the price of linerboard and the prices of the corrugated products are not sufficient to warrant class certification. Hr'g Tr. at 81. Further, defendants argue that because plaintiffs were indirect purchasers of linerboard, individual issues will predominate.

Plaintiffs respond that this case is not atypical. To support their position they presented evidence that the prices of corrugated sheets and boxes is directly related to the price of linerboard. First, they produced several charts which showed that the average prices for corrugated products closely paralleled the prices of linerboard, produced not only by one of plaintiffs' experts, but also by some of the defendant companies. They also produced a document entitled "Comments on Linerboard Pricing, Exports, Et. Al. In Response to Question 2" which states "Box prices are driven by movements in linerboard prices, typically lagging linerboard price changes by 90-180 days." Ex. C, attached to Exhibits in Support of Plaintiffs' Reply Memorandum in Support of Class Certification (Doc. 90). Further, the *Pulp & Paper 1999 North American Factbook* states "Linerboard prices tend to be the major factor driving corrugated box prices* * *." Fischer Aff. Ex. D.

The Court concludes that plaintiffs have produced evidence to support their contention that the prices of corrugated sheets and boxes are directly related to the price of linerboard. Since the prices of corrugated sheets and boxes are correlated to the price of linerboard, plaintiffs argue that there is little significance to the argument that they did not directly purchase linerboard. The Court agrees.

When considering class certification issues, a court must consider two lines of authority. The first, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), teaches that the Court must not inquire "into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. The second instructs that "many of the questions entering into determination of class action questions is intimately involved

with the merits of the claim." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12. *See also In re Resource America*, 202 F.R.D. at 182-83. Recently, the Third Circuit addressed these lines of authority, and held that in "reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action." *Newton*, 259 F.3d at 167-69. *See also Manual for Complex Litigation (Third)* (1995) § 30.1 ("The decision on whether or not to certify a class, therefore, can be as important as decisions on the merits of the action and should be made only after consideration of all relevant evidence and arguments presented by the parties."). This is such a case. The Court addresses defendant's arguments in turn.

First, the Court notes that a case which alleged reduction in output can be considered a price-fixing case. In *General Leaseways, Inc. v. National Truck Leasing Association*, 744 F.2d 588 (7th Cir. 1984), Judge Posner explained:

> A firm that is free from effective competition will reduce its output below the competitive level (whether directly or, as we shall see in a moment, indirectly by raising price). Consumers will pay more when supply is scarcer, yet it will cost the firm less to produce a smaller supply—so the firm's profits will be greater at the reduced output.
>
> * * *
>
> An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and

> dividing markets have the same anticompetitive effects.

Id. at 594-95. *See also Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 226 (7th Cir. 1978) ("[A]n agreement to restrict the production of uranium unquestionably is a price fixing arrangement * * *. In fact, all serious attempts to establish a supracompetitive price must necessarily include an agreement to restrict output."); *United States v. Andreas*, 216 F.3d 645, 667 (7th Cir. 2000) ("Functionally, an agreement to restrict output works in most cases to raises [sic] prices above a competitive level and for this reason, output restrictions have long been treated as *per se* violations [of § 1 of the Sherman Act]. A prototypical output restriction raises prices by reducing supply below demand." (internal citations omitted)). Therefore, the fact that the plaintiffs' conspiracy theory rests on the market effects of a reduction in output does not make it unsuitable for class certification. Rather, plaintiffs' theory puts the case into an established category of antitrust cases.

Both parties rely heavily on *In re Sugar Industry Antitrust Litigation* on the question of whether plaintiffs, as indirect purchasers of linerboard, may maintain this suit. In that case, involving, *inter alia*, a sugar price-fixing conspiracy, the district court certified three of four classes of sugar purchasers: (1) persons and entities who purchased refined sugar for use in other products; (2) retail grocers who purchased refined sugar for resale; and (3) institutional users of sugar, meaning entities which purchased refined sugar for use in the sale of food and beverages, or in dispensing individual sugar packets. *See* 73 F.R.D. at 328. The district court did not certify a fourth proposed class—a class of wholesalers who "have purchased from defendants directly refined sugar, or food products or beverages containing refined sugar" for distribution. *Id.* However, the Third Circuit reversed, and allowed the fourth proposed class to present its claims. *See In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 19 (3d Cir. 1978).

The Third Circuit, in allowing the claims of the wholesaler class to proceed, held that under the then-recent decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), if plaintiffs purchased items which incorporated the price-fixed sugar, such as candy, directly from the producer, their suit was not barred by the Clayton Act. *In re Sugar Indus.*, 579 F.2d at 17. The court noted that

> the product which plaintiff purchased competes not with sugar, but with other candy, and more than one ingredient determines the price. To this extent, there will be some additional complications underlying the damage claims. However, this must not be allowed to obscure the fact that the *plaintiff did purchase directly from the alleged violator* * * *. Plaintiff is a direct purchaser and, therefore, entitled to recover the full extent of the overcharge.

Id. at 17-18 (emphasis added).

Similarly, plaintiffs in this case purchased corrugated sheets or boxes directly from the defendants. *See* Sheets Complaint II at ¶ 5 (General Refractories), ¶ 7 (Halper); Corrugated Box Amended Complaint at ¶ 7 (Oak Valley), ¶ 8 (Garrett Paper), ¶ 9 (Local Baking). Like the candy in *In re Sugar Industries* which contained allegedly price fixed sugar, the corrugated sheets and boxes contain linerboard that was subject to an agreement on output, which is equivalent to a price-fixing agreement. *See General Leaseways*, 744 F.2d at 594-95. The plaintiffs are direct purchasers and, therefore, are entitled to recover the full amount of any overcharge.

The arguments of both parties on this point are directed at an issue not appropriately suited for resolution at the class certification stage. Plaintiffs have presented enough evidence to support their claims that a conspiracy to reduce the supply of linerboard raised the prices of corrugated products. The Court next turns to the question whether plaintiffs can prove class wide impact.

b. Common Proof of Impact

Defendants argue that plaintiffs have not come forward with a viable method of proving impact, thus destroying the predominance requirement of Rule 23(b)(3). They argue at great length that the class certification motions should be denied because plaintiffs have not demonstrated the ability to establish impact or the fact of damage on a class-wide basis. They contend that impact cannot be proven because of the complexities of plaintiffs' argument, and because plaintiffs' experts' opinions do not meet plaintiffs' burden of demonstrating that they can prove class-wide impact. Specifically, they argue that a distinction must be drawn between an econometric model used to establish class-wide impact or causation and an econometric model for proving class-wide damages, and emphasize that none of plaintiffs' experts provided the details of any such model. Further, defendants argue that during the proposed class period, the price that at least one named plaintiff paid for corrugated boxes decreased.

Many courts have held that impact can be presumed upon proof of a conspiracy. *See Lumco Indus., Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 172 (E.D. Pa. 1997); *In re Citric Acid Antitrust Litig.*, 1996 WL 655791, *7 (N.D. Cal. Oct. 2, 1996); *In re Sugar Indus. Antitrust Litig.*, 1976 WL 1374, *24 (N.D. Cal. May 21, 1976); 4 *Newberg on Class Actions*, § 18.28 ("As a rule, the allegation of a price-fixing conspiracy is sufficient to establish predominance of common questions."). This is such a case.

In *Bogosian*, the Third Circuit addressed the issue of impact or "fact of damage" in an antitrust class action. The plaintiff class consisted of over 100,000 service stations lessees who filed a class action against national and regional oil companies, alleging that defendants had unlawfully tied the leasing of gas station sites to the purchase of gasoline. The District Court denied plaintiffs' motion for class certification. The Third Circuit reversed and remanded, holding that a showing of

impact in an antitrust case did not require that each class member show individual injury. The Third Circuit stated that "when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual." *Bogosian*, 561 F.2d at 454. The Third Circuit continued:

> If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at a higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage * * *. Under these circumstances, proof on a common basis would be appropriate.

Id. at 455. *See also In re Flat Glass*, 191 F.R.D. at 485-86 (quoting *Bogosian*); *Lumco Indus.*, 171 F.R.D. at 173 (same).

Defendants also make the argument that, under *Newton v. Merrill Lynch*, plaintiffs' experts are required to demonstrate a viable econometric model for proving impact at the class

certification stage, and they do not.[13] That proposition is not supported by *Newton*.

Newton involved a putative securities class action in which investors charged that their broker-dealers breached their duty to execute trades on the most favorable terms reasonably available. 259 F.3d at 161-63. Specifically, plaintiffs charged that their brokers could have received a better price for securities had they used a computer system other than the central National Best Bid and Offer system ("NBBO"). The evidence disclosed that on some occasions, the NBBO price was better than on other computer systems, at times, the prices were the same, and at other times, the NBBO price was worse than on other systems. *Id.* at 177-80. Under those circumstances, the Third Circuit concluded that not every class member was injured by the failure of the brokers to find the best possible price. *Id.* at 187-88.

In analyzing proof of impact the court held:

> Whether a class member suffered economic loss from a given securities transaction would require

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[13] To the extent that this discussion involves a battle of experts, it not appropriate for the Court to determine which expert is more credible at this time. In *In re Visa Check/Mastermoney Antitrust Litigation*, 192 F.R.D. 68 (E.D.N.Y. 2000), the court, in ruling upon a motion to strike an expert report, expounded upon the role of a *Daubert*-type inquiry at the class certification stage. *See id.* at 76. It held that an expert opinion "is admissible for the narrow purpose for which it is offered: to support the plaintiffs' class certification motion." *Id.* at 77. To preclude such evidence at the class certification stage, it must be shown that the "opinion is the kind of 'junk science' that a *Daubert* inquiry at this preliminary stage ought to screen." *Id.* (citing *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994)).

No limiting motions were filed in the present case although the parties have raised questions about the opposing experts. On the present state of the record, the Court, where appropriate, will use plaintiffs' experts' reports to support the allegations contained in plaintiffs' class certification motions.

> proof of the circumstances surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade was requested. This Herculean task, involving hundreds of millions of transactions, counsels against finding predominance.

Id. at 187-88.

Continuing, the court stated:

> In an effort to gloss over this requirement, plaintiffs suggest their expert could calculate the amount of damages each class member sustained thereby removing proof of injury as an obstacle to certification. In a sworn declaration, plaintiffs' expert provided no model formula, but instead projected that he could devise a formula that would measure damages among the class and serve as a plan for allocation. We are not convinced. But even if plaintiffs could present a viable formula for calculating damages (which they have not), defendants could still require individualized proof of economic loss.

Id. (footnote omitted).

Plaintiffs in this case have advanced econometric models to be used to establish impact.[14] Plaintiffs' expert, Dr. Beyer, has presented two possible means of assessing impact on a class wide basis—multiple regression analysis, and the benchmark or yardstick approach, Beyer Aff. ¶¶ 38-44, which are methods of showing "antitrust impact by generalized proof." *See In re Plastic Cutlery*, 1998 WL 135703 at *7; *In re Flat Glass*, 191 F.R.D. at 485-86 (identifying multiple regression analysis as method of proving impact).

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[14] These models can also be used to show a method for calculating the damages, the amount of the overcharge.

> "Multiple regression analysis is a statistical tool for understanding the relationship between two or more variables * * *. [It] is sometimes well suited to the analysis of data about competing theories in which there are several possible explanations for the relationship among a number of explanatory variables * * *. [It] may also be useful (1) in determining whether a particular effect is present; (2) in measuring the magnitude of a particular effect; and (3) in forecasting what a particular effect would be, but for an intervening event."

Daniel L. Rubinfeld, *Reference Guide on Multiple Regression,* in *Reference Manual on Scientific Evidence* 179, 181 (2d ed. 2000). Multiple regression analysis "can be used to isolate the effects of various influences on corrugated container prices, thereby allowing a determination of the impact of any one of the variables, including, in this case, the impact of the conspiracy." Beyer Aff. at ¶ 43. As the court stated in *In re Plastic Cutlery*: "[t]he court of appeals has noted that multiple regression analysis is reliable when based upon complete and accurate data." *In re Plastic Cutlery*, 1998 WL 135703, at *7 (citing *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1238 (3d Cir. 1993); *Lumco Indus.*, 171 F.R.D. at 174). The yardstick or benchmark model involves a comparison of the characteristics of the linerboard and corrugated products industry with the characteristics of a comparable, or "yardstick" industry that is not affected by the price-fixing conspiracy. *See In re Plastic Cutlery* at *7. Dr. Beyer stated that he would estimate linerboard prices that would have existed absent the conspiracy based on an analysis of linerboard pricing behavior during a more competitive period of time, either before or after the conspiracy. Beyer Aff. ¶ 41.

Newton does not require plaintiffs to have selected a particular econometric model for demonstrating impact (or proving damages) at the class certification stage, and this Court

will not so rule. In *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244 (S.D. Tex. 1978), the identical situation was presented to that court, namely, plaintiffs' expert identified two generally accepted methodologies which he planned on using to determine impact and damages. The court, relying heavily on *Bogosian,* accepted that contention and certified the class. *Id.* at 251-52. Without explicitly so stating, the court did not require the expert to pick one particular method at the class certification stage, since that stage is early in the litigation. *Id.*

Further, defendants characterize *Newton* as requiring dismissal of a class action if even a small percentage of class members are not impacted by the conspiracy. They argue that the district court denied certification based on an analysis of twelve trades, out of hundreds of millions, in which only one resulted in actual economic injury to plaintiffs. 259 F.3d at 177-80. That is not why class certification was denied. *Id.* In affirming the denial of class certification on predominance issues, in addition to the proof of impact analysis detailed above, the Third Circuit identified a list of other terms a broker-dealer must take into account in addition to price, including "order size, trading characteristics of the security, speed of execution, clearing costs, and the cost and difficulty of executing an order in a particular market." *Id.* at 187-88 (citing *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 270 & n.2 (3d Cir. 1998) (en banc)). That court found the inquiry overwhelmingly individualized, and the predominance required not satisfied because these factors "would appear to vary from class member to class member and, for each class member, from trade to trade." *Id.*

On this issue, *Newton* is fundamentally different from the case at bar. In *Newton,* individual issues predominated because of the particularized nature of the inquiry required by the particular facts of the case. Not everyone was injured. In this

case, because of the alleged conspiracy, all purchasers[15] of corrugated sheets and boxes were injured to the extent the increased price of linerboard was reflected in the price paid by plaintiffs. Additionally, experts have been able to create viable formulas for calculating damages caused by price-fixing. *See, e.g., In re Plastic Cutlery*, 1998 WL 135703 at *7; *In re Flat Glass*, 191 F.R.D. at 486-87.

Finally, defendants make the argument that, since the price Garrett Paper paid for pizza boxes decreased during the first five weeks of the class period, proof of impact is not common to the class. The Court disagrees.

The proof which plaintiffs must "adduce to establish a conspiracy to fix prices, and that defendants[']' base price was higher than it would have been absent the conspiracy, would be common to all class members." *In re Flat Glass*, 191 F.R.D. at 486. As the court explained in *In re Industrial Diamonds Antitrust Litigation*,

> [i]t a number of price-fixing cases concerning industries where discounts and individually negotiated prices are common, courts have certified classes where the plaintiffs have alleged that the defendants conspired to set an artificially inflated base price from which negotiations for discounts began. The theory that underlies these decisions is, of course, that the negotiated transaction prices would have been lower if the starting point for negotiations had been list prices set in a competitive market. Hence, if a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser

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[15] The exception being those purchasers whose contracts were tied to a factor independent of the price of linerboard. Those purchasers will be excluded from the classes. *See, infra*, § IV.B.1.d.

> who negotiated an individual price suffered some injury.

In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 383 (S.D.N.Y.1996) (citations omitted). *See also United States v. Container Corp.*, 393 U.S. 333, 337 (1969) (holding that stabilizing prices, even at a "downward level" is a violation of the Sherman Act); *In re Plastic Cutlery*, 1998 WL 135703 at *7 (quoting *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. at 383).

For purposes of class certification, the Court concludes that plaintiffs have presented a viable method for proving class-wide impact. At this point of the litigation, it would be improper to make a determination as to the likely success of using one of the identified methods. *See In re Flat Glass*, 191 F.R.D. at 487. Rather, the court need only find that plaintiffs have identified a valid method for determining impact, which they have.[16]

Plaintiffs have shown that they plan to prove common impact by introducing generalized evidence which will not vary among individual class members. For example, plaintiffs contend that even though prices may have varied among regions, the alleged conspiracy caused these prices to rise throughout the country. Although the prices for corrugated sheets and boxes may have increased due to demand, because defendants allegedly conspired to reduce production of linerboard, the price was higher than it would have been under competitive conditions. Such allegations, supported by the evidence presented, are of the kind contemplated by the Third Circuit in *Bogosian* and *Newton*. *See also*, *Lumco Indus.*, 171 F.R.D. at 173.

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[16] In light of the conflicting expert evidence presented, and the detailed arguments of the parties, the Court is of the belief that such arguments go to the weight of the testimony and must be resolved by the finder of fact.

The Court recognizes that defendants dispute plaintiffs' allegations. However, at the class certification stage, "the Court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve common issues of fact and law." *Lumco Indus.*, 171 F.R.D. at 174. "Plaintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." *Id.* (citing *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524 (M.D. Fla. 1996)). Therefore, the Court concludes that plaintiffs' allegations regarding impact, like their allegations regarding conspiracy, will focus the inquiry on defendants' actions, not on individual questions relating to particular plaintiff class members.

c. Damages

With respect to the amount of damages, the Third Circuit has stated that "[b]ecause separate proceedings can, if necessary, be held on individualized issues such as damages or reliance, such individual questions do not ordinarily preclude the use of the class action device." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d at 817 (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985)). *See In re Flat Glass*, 191 F.R.D. at 487 (citing same). It has also been recognized that "some relaxation of the plaintiff's burden of proving damages is tolerated once an antitrust violation and resulting damages have been established." *In re Flat Glass*, 191 F.R.D. at 487 (quoting 4 *Newberg on Class Actions* § 18.27, at 4S-16 (3d ed. Supp.1998)).

The Court notes that the econometric methods plaintiffs have proposed for proving impact can also be used to calculate damages. *See Lumco Indus.*, 171 F.R.D. at 174 (stating that the yardstick model is a "logical and feasible" method of determining damages). Even though individual issues may arise in calculating damages, this fact does not defeat class

certification. *See In re Flat Glass*, 191 F.R.D. at 487 (citing *Bogosian*, 561 F.2d at 456).

d. Scope of Classes

At oral argument, defendants pointed out one group of plaintiffs which could not have suffered injury—those purchasers of corrugated sheets or boxes whose contracts were tied to particular factors other than the price of linerboard. Similarly, they raised the issue of spot purchasers, putative class members who purchased boxes and sheets as the need arose. Defendants argued that by including these people in the classes, individual issues of damages, as in *Newton*, would predominate.

The *Manual for Complex Litigation (Third)* provides the Court with guidance on the issue of class definition. It instructs that it is "necessary to arrive at a definition that is precise, objective, and presently ascertainable." *Manual for Complex Litigation (Third)* § 30.14. "Definitions, particularly under (b)(3), should avoid criteria that are subjective (e.g., a plaintiff's state of mind) or that depend on the merits (e.g., persons who were discriminated against) * * *. Similarly, objective terms should be used in defining persons to be excluded from the class." *Id.*

Clearly, purchasers of corrugated products under contracts which did not key prices to the price of linerboard must be excluded from the class. On this issue, based on the presentations of the parties at oral argument, identifying those purchasers will not, as in *Newton*, require any "Herculean task." 259 F.3d at 187-88. Thus, the Court will exclude from the class those purchasers of corrugated sheets and corrugated boxes whose contracts precluded the alleged conspiracy from affecting them because the prices paid were not tied to the price of linerboard.

The Court will not exclude spot purchasers of corrugated sheets and corrugated boxes from the definition of the class. If a conspiracy existed to restrict the supply of linerboard,

thereby artificially raising the price of corrugated products, it necessarily affected anyone who made purchases during the class period which were linked to the price of linerboard . Therefore, even though there may have been price negotiations involved in these spot purchases, "if plaintiffs can establish that the base price from which these negotiations occurred was inflated, this would establish at least the fact of damage, even if the extent of the damage by each plaintiff varied." *In re Flat Glass*, 191 F.R.D. at 486 (citing *Bogosian*, 561 F.2d at 455). Likewise, if plaintiffs can establish that a list price was higher, they can demonstrate proof of impact. Therefore, spot purchasers will be certified as part of the classes.

e. Class Period

Plaintiffs ask the Court to certify both classes starting October 1, 1993 and continuing through November 30, 1995. They argue that this period represented the time in which the price of corrugated boxes and containers was effected by the price-fixing conspiracy. Defendants argue that this proposed period is not supported by the evidence.

i. Beginning Date

Plaintiffs base their proposed class period on the length of time that the inventories of linerboard were affected by the alleged conspiracy. The start of the proposed class period is several months after the first production reduction took place. This date is based, in part, on evidence which stated "Box prices are driven by movements in linerboard prices, typically lagging linerboard price changes by 90-180 days." Ex. C, attached to Exhibits in Support of Plaintiffs' Reply Memorandum in Support of Class Certification (Doc. 90). Plaintiffs contend that since defendants took mill downtime in July 1993, October 1, 1993, is an appropriate beginning date as it incorporates this lag time. Moreover, defendants to not seriously challenge this date as the beginning of a potential class period. Therefore, the Court will accept October 1, 1993 as the beginning date for the proposed class.

ii. Ending Date

As with all other aspects of plaintiffs' claims at this stage of the litigation, the length of the class period must have some factual support. Plaintiffs have produced evidence on this point. For example, in a September 1993 presentation, Roger Stone, then president of Stone, stated that "once the inventory overhang is gone, it can't be rebuilt for a minimum of a two-and-a-half year period." Ex. Z to Plaintiffs' Reply Memorandum in Support of Class Certification (Doc. 90). Moreover, in 1994, Mr. Stone stated: "We firmly believed that this strategic decision would jump-start our company's—and our industry's—recovery. We also strongly believed that, due to our industry's limited capacity growth, once the overhang was gone, out industry would be hard pressed to but it back for at least several years." Ex. N to Plaintiffs' Reply Memorandum in Support of Class Certification (Doc. 90).

In addition, the 1996 edition of the *Pulp & Paper North American Factbook* described the linerboard price increases as peaking in mid-year 1995. It stated that "[t]he U.S. linerboard market peaked in the spring of 1995 after a dramatic 18-month recovery. Linerboard prices in the eastern U.S. rose in six consecutive price increases from a low of around $270 to $290/ton in third-quarter 1993 to $530/ton by April 1995—exceeding the previous cyclical peak of $410/ton reached in 1988 in both current and inflation-adjusted constant dollar terms." Ex. P to Plaintiffs' Reply Memorandum in Support of Class Certification (Doc. 90).

At oral argument, plaintiffs produced a chart entitled Containerboard Inventory—End of Month, in support their claim. *See* Tab 3 of Defendants' Class Certification Oral Argument Exhibits (Document No. 104, filed August 16, 2001). On that chart, they noted the reported decrease in the

weeks of supply[17] of containerboard during the class period. Defendants argued that the relevant inquiry should be the inventory of linerboard.

Defendants also pointed to a seeming discrepancy in Dr. Beyer's testimony. He testified that imports of linerboard, which between 1993 and 1995 were over 300,000 tons per year, would have an effect on the price of linerboard that is "probably negligible". *See* Tab 2 of Defendants' Class Certification Oral Argument Exhibits, whereas the "up to 500,000" tons of linerboard not produced had a two and a half year impact on prices. Defendants argue that this contradiction in logic nullifies plaintiffs' argument. In response, plaintiffs contend that imports do not affect inventory, whereas linerboard mill downtime does. Specifically, plaintiffs aver that when trade inventories are at a certain level, customers perceive this level, through trade publications, as evidence of a dwindling supply, thereby making them amenable to price increases or continued purchases at inflated prices. In contrast, plaintiffs say that the level of imports does not have this effect on the market. Hr'g Tr. at 21-23. The Court concludes this is an issue which goes to the merits of the case and is best resolved at a later stage of the proceedings; it does not preclude class certification.

Plaintiffs have produced sufficient evidence to support the proposed class period ending on November 30, 1995. In so ruling, the Court has followed the Third Circuit's instructions in *Newton,* to make a "preliminary inquiry into the merits." *Newton,* 259 F.3d at 167-69. Defendants' arguments are not appropriate for resolution at this stage in the litigation.

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[17] The chart notes that "Weeks of supply is obtained by dividing inventories by the weekly consumption in box plants for the current month, excluding weekends and holidays."

f. Fraudulent Concealment

To toll the four-year statute of limitations of the Sherman Act, and to be entitled to establish claims which extend beyond that period, plaintiffs must demonstrate that defendants fraudulently concealed their unlawful activities and that each plaintiff did not discover these facts despite the exercise of due diligence. *See In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1178-79 (3d Cir. 1993). It generally has been recognized that the question of concealment is a common question, while the questions of discovery of the cause of action by a plaintiff and plaintiff's due diligence present individualized questions. *See In re Flat Glass*, 191 F.R.D. at 487.

Defendants argue that common issues of proof do not predominate with respect to the tolling of the statute of limitations for fraudulent concealment and is therefore not appropriate for class treatment. In reply, plaintiffs argue that principal focus will be on defendants affirmative acts of concealment, and therefore the proof of fraudulent concealment would be common to each member of the classes.

The great majority of cases on this point counsel the Court to conclude that common issues predominate over individual ones with respect to fraudulent concealment. *See In re Flat Glass*, 191 F.R.D. at 488; *In re Glassine and Greaseproof Paper*, 88 F.R.D. at 307; *Hedges Enters.*, 81 F.R.D. at 476 ("that the issues of conspiracy and fact of damage are common to the class and that, while the issues of damages and fraudulent concealment contain both common and individual questions, the common issues predominate with respect to those issues"); *In re Corrugated Container*, 80 F.R.D. at 248 ("criteria are clearly met in spite of any differences regarding the statute of limitations"); *In re Sugar Indus.*, 73 F.R.D. at 348 ("individual aspects of the question of fraudulent concealment do not predominate over the other common issues"); *In re NASDAQ Market-Makers*, 169 F.R.D. at 520 ("Insofar as the individual Plaintiffs are all members of the investing public,

their knowledge and diligence with respect to the information Defendants allegedly concealed from the public can be litigated collectively, without significant reference to individual differences in knowledge or diligence"); *Service Spring, Inc. v. Cambria Spring Co.*, 1984 WL 2925 (N.D. Ill. Jan. 6, 1984).

Defendants cite three cases in which courts have denied class certification based, among other reasons, on findings that fraudulent concealment presents individual issues significant enough to preclude a conclusion that common questions predominate. *See Chevalier v. Baird Sav. Ass'n*, 72 F.R.D. 140 (E.D. Pa. 1976); *In re Anthracite Coal Antitrust Litig.*, 78 F.R.D. 709 (M.D. Pa. 1978); *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978). This Court disagrees with those cases and concludes that the fact of concealment is the predominating question, even though individual questions are also raised, because the inquiry necessarily focuses on defendants' conduct rather than that of plaintiffs. *See In re Flat Glass*, 191 F.R.D. at 488.

In conclusion, the Court determines that the issues of conspiracy and impact are common to the classes and that, while the issues of damages and fraudulent concealment include both common and individual questions, the common issues predominate with respect to those issues. Therefore, those questions of law and fact which are common to the members of the class predominate over those affecting only individual members, and accordingly, the predominance requirement of Rule 23(b)(3) is satisfied.

2. Superiority

Under Rule 23(b)(3), the Court must next "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 632 (3d Cir. 1996) (citations omitted), *aff'd sub nom. Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). First, the Court concludes that a class action is the fairest way to adjudicate the

questions raised in this case, as the cost of maintaining individual actions in this sort of antitrust case would be prohibitive. *See, e.g., Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) ("Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.' " (quoting *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970))); *Rosen v. Fidelity Fixed Income Trust*, 169 F.R.D. 295, 301 (E.D. Pa. 1995) ("class certification remains a desirable method of seeking redress under the securities laws, particularly where, as here, 'a large number of individuals [allegedly] have been injured, although no one person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf.'" (quoting *In re Regal Communications Corp. Sec. Litig.*, 1995 WL 550454, *7 (E.D. Pa. Sept. 14, 1995)) (alteration in original)).

Secondly, the class action will not be inefficient or unmanageable. Each class member's claims center on common questions of law and fact—namely whether or not the defendants committed the acts alleged—which require the same sort of proof. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) ("The principal purposes of the class action procedure [are] promotion of efficiency and economy of litigation.").

Therefore, the Court determines that plaintiffs have satisfied the conditions of Rule 23(b)(3) as common questions of law or fact predominate over individual questions, and a class action is superior to individual suits.

C. Definition of the Classes

"Care should be taken to define the class in objective terms capable of membership ascertainment when appropriate, without regard to the merits of the claim or the seeking of particular relief. Such a definition * * * does not require the court to engage in an impermissible consideration of the merits

of the claims in connection with its class certification determination." *Rendler*, 182 F.R.D. at 160 (quoting 2 *Newberg on Class Actions* at § 6.14) (alterations in original).

By defining the classes as proposed by plaintiffs, with the modifications as stated in § IV.B.1.d, *supra*, the Court will not have to engage in any impermissible consideration of the merits of the claim. Thus, the classes will be defined as follows:

> Class 1—Sheet Class
>
> All individuals and entities which purchased corrugated sheets in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals and entities which purchased corrugated sheets pursuant to contracts in which the purchase price was not tied to the price of linerboard.
>
> Class 2—Box Class
>
> All individuals and entities which purchased corrugated containers in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals and entities which purchased corrugated containers pursuant to contracts in which the purchase price was not tied to the price of linerboard or containerboard.

V. Conclusion

The Court notes that the certification of a class is not a final order, and the Court retains jurisdiction to modify the class until there is a decision on the merits. *See* Fed. R. Civ. P. 23(c)(2) ("An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."). "[T]he Committee Notes on Rule 23 envision modification of a class certification 'if, upon fuller development of the facts, the original determination appears unsound.'" *Zenith Labs., Inc. v. Carter-Wallace*, 530 F.2d 508, 512 (3d Cir. 1976). As this case proceeds, the Court will examine whether the prerequisites for class certification remain satisfied, and will act accordingly if they are not.

For the foregoing reasons, the Court concludes plaintiffs have satisfied the requirements for class certification and will certify the classes as defined. An appropriate order follows.

ORDER

AND NOW, this 4th day of September, 2001, upon consideration of Corrugated Sheet Plaintiffs' Motion for Class Certification (Document No. 76, filed January 11, 2001) and supporting Memorandum of Law (Document No. 74, filed January 10, 2001), and Corrugated Box Plaintiffs' Motion for Class Certification (Document No. 75, filed January 10, 2001), and the related submissions; following oral argument on August 8, 2001, for the reasons set forth in the foregoing Memorandum, IT IS ORDERED as follows:

1. The following plaintiff classes, defined as follows, are CERTIFIED under Federal Rule of Civil Procedure 23(b)(3):

   a. Sheet Class

   All individuals and entities which purchased corrugated sheets in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995,

excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals or entities which purchased corrugated sheets pursuant to contracts in which the purchase price was not tied to the price of linerboard.

b. Box Class

All individuals and entities which purchased corrugated containers in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals and entities which purchased corrugated containers pursuant to contracts in which the purchase price was not tied to the price of linerboard or containerboard.

2. Corrugated Sheet Plaintiffs' Motion for Class Certification, with the class defined as above, is GRANTED.

3. Corrugated Box Plaintiffs' Motion for Class Certification, with the class defined as above, is GRANTED.

Supreme Court, U.S.
FILED
MAR 20 2003
CLERK

(2)

No. 02-1070

IN THE

Supreme Court of the United States

GAYLORD CONTAINER CORP., ET AL.,

Petitioners,

v.

GARRETT PAPER, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court, in the absence of a Circuit split, grant interlocutory review in a case involving only the routine application of the legal principle set out in the text of Fed. R. Civ. P. 23(b)(3) which permits class actions when "questions of law or fact common to the members of the class predominate over any question affecting only individual members"?

2. Should this Court review a question about the relevance of fraudulent concealment to class certification that, again, involves only the application of Rule 23(b)(3) to a particular set of facts, where that is an issue on which the Circuits are not divided and this case is one in which a determination on that issue was not determinative of the class certification decision below?

RULE 29.6 STATEMENT

The parent company of Respondent General Refractories Company is G.R.C. Holding Co., which is owned by the Raymond and Ruth Perelman Community Foundation.

The parent company of Respondent Albert I. Halper Corrugated Box Co., Inc., is Box USA, Inc.

Seventy-eight percent of Respondent Oak Valley Farms, Inc., is owned by El Jay Poultry Corp.

Respondents Garrett Paper, Inc., and Local Baking Products, Inc., have no parent company.

No publicly held company owns more than 10% of the stock of any of Respondents.

Respondents represent two classes of purchasers of corrugated sheets and of corrugated boxes, which include many publicly held corporations.

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INTRODUCTION

This interlocutory appeal concerns only the routine application of settled class certification law to a run-of-the-mine antitrust case involving a classic *per se* violation of Section 1 of the Sherman Act, a conspiracy to raise and fix prices. Petitioners are major integrated manufacturers and sellers of linerboard, corrugated sheets and corrugated boxes.[1] See Pet. App. 4a n. 1.[2] This suit alleges they engaged in a conspiracy artificially to raise the prices of corrugated boxes and sheets. This was achieved by idling their mills used to produce linerboard, the principal manufactured component of corrugated boxes and sheets, and removing an unprecedented amount of tonnage from production during a period of increasing demand so that inventories fell to their lowest levels in twenty years. Pet. App. 8a-9a. Prices rose sharply, doubling in less than a year. Pet. App. 9a-10a.

Respondents are direct purchasers of corrugated boxes and sheets. Fed. R. Civ. P. 23(b)(3) provides that a class may be certified when, *inter alia*, "questions of law or fact common to the members of the class predominate over any question affecting only individual members." The district court concluded that common questions predominated in the instant case and certified two 23(b)(3) classes. In this, it followed extensive authority and empirical experience in over eighty reported price-fixing cases in which classes were certified, many involving the paper and box industry, not one

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[1] The district court has been advised that settlement has been reached with Petitioners Temple-Inland, Inc., and Gaylord Container Corp.

[2] "Linerboard includes any grade of paperboard suitable for use in the production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes and for a variety of industrial and commercial applications. Corrugated sheets are made by gluing a fluted sheet which is not made of linerboard, known as the corrugating medium, between facing sheets of linerboard; corrugated sheets are also referred to as containerboard." Pet. App. 4a n. 1.

of which was ever later decertified because of the predominance issue raised by Petitioners.[3] Its determination was made upon an extensive evidentiary record. The hearing before the district court lasted six hours and the record on appeal spanned almost 1,600 pages. It included deposition testimony, hundreds of documents adduced by Respondents from Petitioners' own files, other documents and testimony adduced during Federal Trade Commission proceedings concerning this matter, and reports and depositions of three distinguished economists.

Petitioners obtained interlocutory review before the Court of Appeals under Fed. R. Civ. P. 23(f). After closely examining the expert submissions and extensive testimony supporting the factual bases of the district court's ruling, the Court of Appeals unanimously affirmed that decision, finding that the district court did not abuse its discretion in certifying these classes on the particular facts of this case. A petition for rehearing *en banc* was denied without dissent. Petitioners now seek further interlocutory review before this Court of this inherently conditional interlocutory class certification order, issued pursuant to a Rule which itself provides that such certification "may be altered or amended as may be desirable from time to time." Fed. R. Civ. P. 23(d).[4]

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[3] See e.g. *Paper Systems, Inc. v. Nippon Paper Industries Co., Ltd.*, 281 F.3d 629 (7th Cir. 2002); *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981); *In re Commercial Tissue Antitrust Litigation*, 183 F.R.D. 589 (N.D. Fla. 1998); *In re Wirebound Boxes Antitrust Litigation*, 128 F.R.D. 262 (D. Minn. 1989); *In re Glassine and Greaseproof Paper Antitrust Litigation*, 88 F.R.D. 302 (E.D. Pa. 1980) (Pollak, J.); *In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D. Pa. 1979); *In re Folding Carton Antitrust Litigation*, 75 F.R.D. 727 (N.D. Ill. 1977); *Hedges Enterprises, Inc. v. Continental Group, Inc.*, 81 F.R.D. 461 (E.D. Pa. 1979). The eighty reported decisions are listed in an exhibit to the Third Circuit Brief of Respondents General Refractories Company, et al.

[4] Respondents have consented to the submission by the Business Roundtable of a brief *amicus curiae* in support of the Petition. The

Despite Petitioners' colorful rhetoric, the decision below is neither "nationally significant," Pet. 16, nor out of the ordinary in any way. As this Court recognized in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 625 (1997) "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." Indeed, classes of purchasers virtually identical to those certified below were certified in another case alleging a horizontal conspiracy to raise the prices on boxes and sheets, a case that was tried to a classwide verdict. See *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D.Tex. 1978). And again, as this Court's language in *Amchem* suggests, over eighty antitrust class actions have been certified by courts across the country over the past several decades.[5]

The Court of Appeals here carefully applied Rule 23 precisely as it is applied in every other Circuit. As the Court of Appeals recognized, the application of Rule 23 is not mechanical – it requires close examination of the facts of the particular case. Pet. App. 20a-24a. Unsurprisingly, then, the inherently fact-bound Rule 23 determination in this case does not conflict with any decision of this Court or of any other Court of Appeals. Review consequently is not warranted.

Chairman of the Business Roundtable is John T. Dillon, Chairman and Chief Executive Officer of Petitioner International Paper, a central defendant in this action. See http://www.brtable.org/newsroom_officers.htm (last visited March 17, 2003).

[5] Of course, many of this Court's most significant rulings relating to the antitrust laws have arisen in the context of cases brought as class actions. See, e.g. *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *California v. ARC America Corp.*, 490 U.S. 93 (1989); *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983); *Blue Shield of Virginia v. McCready,* 457 U.S. 465 (1982); *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975).

REASONS FOR DENYING THE PETITION

I. There is No Circuit Split Implicated by the Court of Appeals' Conclusion Here About the Susceptibility to Classwide Proof of the Fact of Injury.

A. Background.

The first question on which Petitioners seek review is whether the *fact* of classwide injury can be proven by classwide proof. See Pet. 10 and n. 1. To establish liability under Section 1 of the Sherman Act, one must prove both a violation of antitrust law, and that the violation caused injury. Whether in the context of a class action the fact of such injury (as opposed to the amount of such injury, something not at issue in this Petition, see Pet. 10 and n. 1) can be established on a classwide basis, or will involve sufficient individualized questions that common questions can no longer be held to "predominate," is something that obviously can be answered only on the facts of each case.

Petitioners argue that the conclusion of the Court of Appeals that the district court did not abuse its discretion in concluding in this case that classwide proof could be used to demonstrate the fact of injury caused by Petitioners' unlawful conspiracy "deepens" a purported Circuit conflict on an "important and recurring" issue that has persisted unaddressed by this Court for at least the past 28 years. This obviously factbound determination did no such thing. [6]

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[6] Petitioners claim that the Second Circuit's decision in *In re Master Key Antitrust Litigation*, 528 F. 2d 5 (2d Cir. 1975), created this purported Circuit split. That they say this split was created twenty-eight years ago is alone enough to undermine the credibility of their assertion of a Circuit split: It is, of course, highly unlikely that an "important," "recurring" split in authority among the Circuits, Pet. 14 – one whose "effect . . . cannot be overstated," Pet. 15 – has persisted unresolved by this Court for almost three decades.

The Court of Appeals carefully applied the appropriate standard. It affirmed the district court's conclusion that, based on the evidence before it, the question of antitrust impact could be shown in this case on a classwide basis, and that individualized issues with respect to the fact of injury thus did not defeat a finding of predominance.

The court recognized that, in reaching its conclusion, the district court had not relied merely upon a presumption that the conspiracy would have raised prices for all purchasers, although it found such a presumption justified. Pet. App. 10a-13a. The Third Circuit found that the complaint alleged a classic antitrust conspiracy which, if proven, would, following the law of supply and demand, have increased prices to all class members:

> The economic laws of supply and demand run in tandem with the tenets of logic. A reduction in supply will cause prices to rise. A deliberate cut in supply, as alleged here, is a deliberate interference with market forces. Coincident with this interference with the normal market forces, linerboard prices in the eastern United States rose in six consecutive price increases, from a low of around $270 to $290 per ton in third quarter 1993 to $530 per ton by April 1995. Reduced to its essence, what Appellants say is that there is no correlation between the reduction in supply of linerboard and the subsequent price increases. What they really contend is that plaintiffs' argument is anchored on the familiar fallacy of *post hoc propter hoc*, the fallacy of inferring causation from temporal succession only, a reasoning from what happens in sequence is merely an assumption of a causal connection.
>
> The *post hoc* accusation is trumped, however, by the laws of economics.

Pet. App. 13a.

The Court of Appeals found that the district court had not relied on this presumption of impact alone in determining that the fact of injury could be shown on a classwide basis. Rather, it had used a "belt and suspenders" approach. Pet. App. 14a. As the Court of Appeals explained, the district court "credited the testimony of plaintiffs' experts, opinions that were supported by charts, studies and articles from leading trade publications." Pet. App. 14a; see also id. at 14a-17a (detailing the evidence before the district court).

A first expert had concluded, following a qualitative analysis of the industry structure, that the "'alleged conspiracy would have had a common, class-wide impact, and that all purchasers of corrugated containers would have paid a higher price as a result of the conspiracy.'" Pet. App. 15a. A second expert reached a similar conclusion that was "supported by relevant data." Id. In addition to the conclusions based upon the qualitative analysis that had already been done by the two economic experts, these experts also provided "quantitative methods for *corroborating*" their conclusions about impact. Pet. App. 15a (emphasis added). These experts had testified that "advanced econometric models could be effectively prepared to establish class-wide impact" in several independent ways.[7] As the Court of Appeals described, the experts explained that both multiple regression analysis and benchmark or yardstick approaches could be used to isolate the impact of the conspiracy on corrugated prices. Id. at 14a-18a.[8] Based on

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[7] The expert analyses proposed are common methods for proving antitrust injury on a classwide basis. See Daniel L. Rubinfeld, "Reference Guide on Multiple Regression," in *Reference Manual on Scientific Evidence* 179, 181 (2d ed. 2000).

[8] These analyses were possible in part because of the specific nature of the corrugated sheet and box industry. It is a highly vertically integrated industry in which, as the evidence credited by the courts below makes clear, prices of corrugated sheets and containers are tied to the cost of linerboard. See Pet. App. 14a-17a. And, while Petitioners attempt to use the district court's narrow class definition *against* Respondents, Pet. 14-

all this, the Court of Appeals found that in this case, "the district court did not err in determining that plaintiffs showed they could establish injury on a classwide basis." Pet. App. 17a.[9]

Of course, not only was the district court's conclusion that proof of injury to purchasers in the form of higher prices might be proven on a classwide basis fully supported by the evidence, it makes perfect sense. As this Court found long ago, "[T]he corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic. . . ." *United States v. Container Corp. of America,* 393 U.S. 333, 337 (1969). In such circumstances, it is unsurprising that a reduction in supply and concomitant increase in prices will affect all those who purchase the product.[10] See, e.g., *In re*

15, in fact, as their description makes clear, the district court eliminated from the class those purchasers whose purchase prices were, by contract, not tied to linerboard or containerboard. See also Pet. 7 (class definitions).

[9] In at least two places, Petitioners erroneously assert that the Court of Appeals simply accepted or relied upon "respondents's assurances" that injury could be proven on a classwide basis, Pet. 1, 15, in reaching its decision. See also id. at 15 (falsely stating that Respondents merely "proffer[ed] experts."). As the description of the opinion of the Court of Appeals in the text makes clear, this is nothing more than a mischaracterization of the decision below.

[10] It is of course for this reason that output restriction conspiracies are *per se* violations of the antitrust laws. *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma* 468 U.S. 85, 100 (1984) ("Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high..."); see also *General Leaseways, Inc. v. National Truck Leasing Ass'n,* 744 F.2d 588, 594-95 (7th Cir. 1984) (Posner, J.) ("An agreement on output also equates to a price-fixing agreement. . . . . If. . . firms restrict output directly, price will . . . rise . . . . ").

Plywood Antitrust Litigation, 655 F.2d 627, 635 (5th Cir. 1981), discussed infra at 13-14.[11]

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[11] Petitioners did argue below that injury could not be shown by classwide proof because there were some contracts that had had a fixed price term throughout the class period and that would have been unaffected by the linerboard price increases caused by Petitioners' unlawful conspiracy. But in response to Petitioners' objection, as Petitioners concede, id., the district court's order explicitly excluded from the certified classes those who purchased corrugated sheets "pursuant to contracts in which the purchase price was not tied to the price of linerboard" and those who purchased corrugated containers "pursuant to contracts in which the purchase price was not tied to the price of linerboard or containerboard." Id.

In response to the Third Circuit's questions at oral argument, counsel for Petitioners was forced to admit that though there were thousands of customers – they now say "millions of individual transactions," Pet. 1 – they had been able to find only "eight or ten" contracts with fixed price terms:

> The Court: Let me get back to you, then. How many—on the record, how many contracts out there are not pegged to linerboards specifically?
>
> Ms. Mather: There are a number, Your Honor, which are flat, fixed. There are a number which are—
>
> The Court: Six, twelve, a hundred? What does the record show?
>
> Ms. Mather: The record shows that there were perhaps maybe eight or ten fixed contracts. But—
>
> The Court: Eight or ten.
>
> Ms. Mather:--Your Honor—
>
> The Court: That was my understanding.

Transcript of Oral Argument before the Third Circuit, July 15, 2002 at 14-15. In response to subsequent discovery requests seeking further such contracts, Petitioners produced no contracts for boxes linked to any index other than linerboard prices and just seven contracts (out of those for many thousands of customers) that had a constant price for the entire conspiracy period. See, Reply Memorandum to Plaintiffs' Motion Concerning Unresolved Discovery Issues, filed March 11, 2003 at 2 and 3 (E.D. Pa. MDL No. 1261). Of course, the entire issue is now beside the point because, as described above, the district court expressly

B. No Circuit Has Held that the Fact of Antitrust Injury is So "Inherently Individualized" that it Precludes Class Certification as a Matter of Law, Nor Does the Decision Below Conflict With that of Any Other Circuit.

Unsurprisingly, none of the cases cited by Petitioners conflicts with the Court of Appeals' factbound conclusion. Nor, more fundamentally, do any of them stand for the proposition that Petitioners urge: that in an antitrust case the element of fact of injury is "inherently individualized" so that it "precludes class certification." Pet. 10.

It would be extraordinary if they did, since this would apparently preclude class certification in all antitrust cases, in which fact of injury is always an element But of course, as this Court recognized in *Amchem*, "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." 521 U.S. at 625.[12] There is thus obviously no *per se* rule prohibiting certification in such cases.

Consequently, all the Circuits agree that whether the fact of injury involves sufficient individualized questions to preclude a finding of predominance is a conclusion that must be made, as it was in this case, on a case by case basis through application of the Rule 23(b)(3) standard to the facts before the court.[13] While Petitioners are doubtless

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excluded from the classes those purchasers whose contracts were not tied to the price of linerboard.

[12]See also e.g. *Hawaii v. Standard Oil Co. of Cal.* 405 U.S. 251, 266 (1972) ("Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations . . . Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.").

[13]Obviously a routine application of Rule 23 (b)(3) in which common issues are found to predominate does not violate either the Rules Enabling Act, 28 U.S.C. §2072(b), or the Due Process Clause of the Fifth Amendment. Despite their colorful invocation of these provisions, *e.g.*, Pet. 2, 15-16, Petitioners do not seriously contend otherwise.

disappointed by the outcome below, it implicates no division in authority among the Courts of Appeals.

1. To begin with, *Windham v. American Brands*, 565 F. 2d 59 (4th Cir. 1977) (en banc), the case on which Petitioners primarily rely does not "*h[o]ld* that the fact of individual injury is an individual question that precludes class certification." Pet. 11 (emphasis added). Indeed, it says the opposite: that there is no such *per se* rule.

The Court of Appeals in *Windham* affirmed the district court's judgment that a particular class action was "unmanageable" under a deferential standard under which the appellants had "the burden of establishing that the exercise of discretion by the district judge in denying, as he did, class certification was clearly wrong." *Windham*, 565 F. 2d at 65. The court never said that to certify the class there would have been an abuse of discretion, and, rather than setting out any *per se* rule, the Court made clear that under Rule 23 "the issue is one of fact." Id.

The Court of Appeals stated explicitly that that there are circumstances (like those found by the district court and the Court of Appeals in the instant case) when "the existence of individualized claims for damages seems to offer no barrier to class certification." Id. at 68. It concluded that the differences in outcome among decisions of federal courts involving questions of proof of injury and damages did not reflect any difference in legal standard applied, but were merely a result of factual differences among the cases: "Th[e] conflict in result among . . . decisions seems to reflect more a factual difference in the cases themselves than a difference over legal principles." Id. at 68 (footnotes omitted).[14]

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[14] The Fourth Circuit's observation in the dictum relied upon by Petitioners, that "While a[n antitrust] case may present a common question of violation, the issues of injury and damage remain the critical

And, perhaps most importantly, the language from *Windham* cited by Petitioners is not understood in that Circuit to state a holding precluding class certification in antitrust cases, as the myriad antitrust horizontal conspiracy class actions that have been certified there in the past 25 years make clear. [15] See, e.g., *Deloach v. Philip Morris Companies, Inc.*, 206 F.R.D. 551 (M.D.N.C. 2002). *petition for permission to appeal pursuant to Rule 23(f) denied* (4th Cir. June 11, 2002); *Meredith v. Mid-Atlantic Coca Cola Bottling Co., Inc.*, 129 F.R.D. 130 (E.D.Va.1989); *National Constructors Association v. National Electrical Contractors Association, Inc.*, 498 F.Supp. 510 (D. Md. 1980); *Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft,*

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issues in such a case and are always strictly individualized," id. at 66, did not even purport to be a holding that the issue of injury always precludes a showing that common issues predominate. It was a preface to a discussion of the impermissibility of "fluid recovery," in which injury and damages would be demonstrated to the "class" without a showing of individual injury to the class members themselves. See id. This was an idea current in the late 1970s, but generally rejected by the courts. One of the holdings of *Windham* was that the difficulty of proving individualized damages could not be overcome by the use of such a "fluid recovery." Id. at 72. Of course there is not the slightest suggestion that "fluid recovery" was sought or raised as an issue in this case.

[15] If, in the twenty-five years since *Windham* the Fourth Circuit had wanted to explain that they intended the inflexible rule that Petitioners contend, they have had ample opportunity to do so. Indeed, just recently, they denied a Rule 23(f) motion in *Deloach v. Philip Morris Companies, Inc.*, 206 F.R.D. 551 (M.D.N.C. 2002), *petition for permission to appeal pursuant to Rule 23(f) denied* (4th Cir. June 11, 2002), seeking to decertify in a different conspiracy the very same class that had been denied by the Fourth Circuit *en banc* in *Windham*, a class now certified by the district court based upon a different factual record and significant intervening precedent.

1979 WL 1718 (D. Md. 1979); *In Re Independent Gasoline Antitrust Litigation,* 79 F.R.D. 552 (D. Md. 1978).[16]

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[16] Nor does *Windham* conflict even on its facts with the instant case. *Windham* involved allegations of a variety of different conspiracies to raise prices at auction in a "non-standardized" commodity, flue-cured tobacco. Id. at 62. Such tobacco is given one of 161 grades by the government, which do not themselves correspond to grades used by purchasers. Id. "The prices which prevail at the auctions vary from day to day and are not uniform, even for tobacco which may be graded alike by government inspectors" Id. at 63. As the Court of Appeals described, plaintiffs alleged extraordinarily complex conspiracies to alter prices at auction that involved different actions and different consequences at different auctions, on different days, and in different weeks. Id. at 63-64. Thus this was not the kind of oligopoly restriction of output that lies at the heart of the instant case, which involves a single conspiracy relating to a fungible product.

Indeed, many cases have distinguished the factual and legal complexity of *Windham* from more typical antitrust cases involving horizontal price fixing, and particularly those involving boxes and paper products. See, e.g. *In re Folding Carton Antitrust Litigation,* 88 F.R.D. 211, 217 (D.Ill. 1980) ("The case... does not involve a non-standardized, non-fungible, seasonal commodity sold at auction with extensive price fluctuations from market to market, from day to day, and from government grade to government grade as in [*Windham* v.] *American Brands*. ...Also, unlike *American Brands*, all members of this class are suing under the same theory of recovery."); *Hedges Enterprises, Inc. v. Continental Group, Inc.* 81 F.R.D. 461, 475 (E.D..Pa. 1979) ("*Windham* . . . is clearly distinguishable on its facts from the case before us [involving the fixing of prices for paper bags]. In *Windham*, the structure of the tobacco market created such inherent diversity and required such highly individualized, non-uniform negotiations with respect to each unique sale that proof of impact could not even be commenced by a demonstration of common proof. In the case sub judice, as in those cases noted in support of our conclusion, the market is not so inherently diverse nor are individual negotiations so entirely unique that at least some common basis of proof of the fact of damage could not be found."); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 425-26 (D.N.M. 1988); *In re Independent Gasoline Antitrust Litigation,* 79 F.R.D. 552, 562-63 (D. Md.,1978); *In re Potash Antitrust Litigation,* 159 F.R.D. 682, 696 (D. Minn. 1995); *Technical Learning Collective, Inc. v. Daimler Benz AG,* 1979 WL 1718, *12 (D. Md. 1979).

2. The purportedly conflicting Fifth Circuit precedent, *Alabama v. Blue Bird Body Company, Inc.*, 573 F.2d 309 (5th Cir. 1978), rather than holding that the issue of antitrust injury *precluded* class certification as a matter of law also holds the opposite. In remanding for determination of the question of predominance on the facts of the case before it the Court of Appeals explicitly said: "We are not attempting, however, to hold as a matter of law that the impact requirement in the case before us defeats any possibility of a class certification." Id. at 328. And it made clear that its holding did "not mean of course that cases do not exist wherein this requirement of certainty [of proof of 'impact'] cannot be established by some sort of classwide proof." Id. at 327. In fact, it went on to say that "In a price-fixing case, it would seem that this classwide proof would have to be coupled with – or it may consist entirely of – proof of purchase." Id. at 327 n. 24.

In acknowledging in a footnote that *Blue Bird* recognized that there were classes in which impact or "fact of injury" could be shown on a classwide basis, Pet. 13 n. 2, Petitioners in essence concede that there is no split between the Fifth Circuit and the court below on the question they claim is presented, the "fundamental issue whether an inherently individualized element of antitrust liability – fact of injury – precludes class certification." Pet. 10.

And indeed, subsequent to *Blue Bird,* in a case brought against several of the Petitioners in this case, but not cited by them, the Fifth Circuit affirmed a judgment following trial in favor of a national class of purchasers of forest products in an antitrust case. *In re Plywood Antitrust Litigation,* 655 F.2d 627 (5th Cir. 1981). The Fifth Circuit found no difficulty in applying *Blue Bird's* analysis of the impact issue in affirming the class-wide verdict on impact:

> Where, as here, plaintiffs prove a statutory violation in the form of a price fixing conspiracy with respect to a

> homogeneous or fungible product that was marketed in a similar manner throughout the country, it is not unlikely that plaintiffs also will be able to prove by a preponderance of the evidence that purchasers of the product in question were injured in their property or business. See *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 324 (5th Cir. 1978).

Id. at 635.[17]

The Fifth Circuit has elsewhere affirmed a classwide verdict in an antitrust class action, see *Greenhaw v. Lubbock County Liquor Association*, 721 F.2d 1019 (5th Cir. 1983), and antitrust class actions are routinely certified in the Fifth Circuit. Indeed, *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D.Tex. 1978) involved virtually the very same classes at issue in this case, but a much longer and more complex conspiracy. *Corrugated Container* was ultimately tried to a verdict.[18] See also *Paper Systems, Inc.*

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[17] Here the Third Circuit recognized the fungible nature of corrugated products, Pet. App. 14a, as did this Court in *United States v. Container Corp. of America,* 393 U.S. 333, 337 (1969), and it accepted unrebutted evidence that price movements of corrugated products did not vary regionally. Pet. App. 15a.

[18] That several petitioners here were defendants in both *Corrugated* and *Plywood*, each of which proceeded to class-wide trials and verdicts in one of the very circuits that petitioners claim to be in conflict with the Third Circuit, standing alone, defeats Petitioners' argument that the Third Circuit's decision is inconsistent with that of other Circuits, or that its decision has somehow created a coercive tool that will result in "unwarranted settlements." Pet. 2.

Indeed, the many other antitrust class action suits including those involving entire industries that have proceeded to judgment – sometimes for plaintiffs and sometimes for defendants – substantially undermines Petitioners' claim that such cases force settlement. See, e.g. *In re Brand Name Prescription Drug Antitrust Litigation*, 186 F. 3d 781 (7th Cir. 1999) (judgment as matter of law in favor of defendants at conclusion of plaintiffs' case); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000) (summary judgment at conclusion of discovery); *In re Baby Foods Antitrust Litigation,* 166 F.3d

v. Nippon Paper Industries Co., Ltd., 281 F.3d 629, 631 (7th Cir. 2002) (Easterbrook, J.) (reversing summary judgment against a class of plaintiffs and stating "[t]he paper business has a long history of cartelization: criminal prosecutions and civil antitrust actions are depressingly common."). Many other antitrust class actions decided in the Fifth Circuit and the Eleventh Circuit under the pre-Circuit-division Fifth Circuit precedent cited by Petitioners, too, belie their

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112 (3d Cir. 1999) (same); *Greenhaw v. Lubbock County Liquor Association*, 721 F.2d 1019 (5th Cir. 1983) (affirming jury verdict in favor of class); *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998) (summary judgment in favor of class); *Coleman v. Cannon Oil Co.* 911 F. Supp. 510 (M.D. Ala 1995) (class verdict finding violation and nominal damages).

Judge Posner's opinion in *In re Rhone-Poulenc Rorer, Inc.*, 51 F. 3d 1293, 1298-99 (7th Cir. 1995), on which Petitioners would rely, did not suggest that class certification should be denied in order to prevent "unwarranted settlements," Pet. 2. "We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle." 51 F. 3d at 1299. What it said was that unwarranted pressure might occur in cases in which class certification was granted but the claims likely lacked merit. See id. at 1299 (relying on the "demonstrated great likelihood that the plaintiffs' claims," of which 92.3% of similar claims brought as individual suits were won by defendants, "lack legal merit"). And the mechanism by which the Seventh Circuit determined to address this risk was not by preventing the certification of classes. Rather it was to allow the additional step of interlocutory review by the Court of Appeals in such cases under Fed. R. Civ. P. 23(f), something that, despite the fact that this case does not fit the pattern of claims that likely lack merit, Petitioners sought below and have already been given, albeit with a result that disappointed them. Indeed, Judge Posner, whose concern about extortionate settlement is clear, has shown no hesitation about permitting class actions to proceed in antitrust cases. See, e.g., *In Re High Fructose Corn Syrup Antitrust Litigation*, 295 F. 3d 651 (7th Cir. 2002), cert. denied, 71 U.S.L.W. 3547 (February 24, 2003) (reversing summary judgment against class); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997) (same).

argument regarding the existence of any *per se* rule against such certification. See e.g., *In re Commercial Tissue Antitrust Litigation*, 183 F.R.D. 589 (N.D.Fla.1998); *In re Disposable Contact Lens Antitrust Litigation*, 170 F.R.D. 524 (M.D.Fla. 1996); *In re Catfish Antitrust Litigation*, 826 F.Supp. 1019, (N.D.Miss. 1993); *In re Carbon Dioxide Antitrust Litigation*, 149 F.R.D. 229 (M.D.Fla.1993); *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516 (M.D.Ala. 1992); *Transamerican Refining Corp. v. Dravo Corp.*, 130 F.R.D. 70 (S.D.Tex. 1990); *In re South Central States Bakery Products Antitrust Litigation*, 86 F.R.D. 407 (M.D.La. 1980); *Fradette v. American Service Corp.*, 1979 WL 1609 (S.D.Fla. 1979).[19]

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[19]The Fifth Circuit in *Shumate & Co. v. National Association of Securities Dealers*, 509 F. 2d 147 (5th Cir. 1975), which was, in any event, decided before *Blue Bird* and *Plywood*, did not assert the blanket rule that Petitioners advocate, ruling only, as appropriate, on the facts before it. Indeed, it acknowledged the possibility of a case such as the one the Court of Appeals below found this to be: "This case is different from one where liability can be shown as to all class members, with only the amount of damage to be determined as to each." Id.

Nor do even the outcomes of the decisions of the Fifth Circuit cited by Petitioners conflict with the decision below. *Shumate* affirmed directed verdicts against the putative class representative on the ground that there was insufficient evidence of any injury even to him. The Court of Appeals found that there was no abuse of discretion in denying class certification on the basis that there were individualized questions about injury. 509 F. 2d at 155. As the district court explained, in light of the allegations in the complaint, "liability could not be imposed until it was shown that each individual class member would have traded in listed securities but for their exclusion from the NASDAQ system or that but for Rules 394 and 396 each individual non-exchange broker would have traded off the floor with exchange members. This inquiry would extend to 3,000 purported class members and in effect would make these three cases completely unmanageable as class actions." *Shumate v. National Association of Securities Dealers,* 1973 U.S. Dist. LEXIS 13876, *2 (N.D. Tex. 1973). Obviously such a case, where one must demonstrate what one would have done but for the conspiracy, is a far cry from the instant case where there is no question that the class members were purchasers of corrugated boxes and sheets during the period of the

3. Finally, Petitioners cite a Ninth Circuit case, *In re Hotel Telephone Charges*, 500 F. 2d 86 (9th Cir. 1974), but they do not quite assert that that case stands for the blanket rule with which they claim the decision below conflicts. See Pet. 13. Nor could they, given that that case involved only the application of Rule 23 to the particular facts before the court and a finding that the Sherman Act claims there raised a range of individualized issues such that class treatment was inappropriate. Id. at 89. That case involved millions of plaintiffs and many hundreds of defendant hotels. Predominance was defeated there not just because of issues of proof of the fact of injury, but of variations in evidence with respect to the hundreds of defendants. As the Court there said:

> In order substantially to establish each hotel's involvement in a conspiracy to violate the anti-trust laws, each hotel's knowing participation would be a requisite element of proof. Furthermore, since the surcharges varied from hotel to hotel, the amount of each defendant's surcharge would necessarily require individual treatment, as would the period in which

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conspiracy. Lest there be any doubt, the Third Circuit, too, denies class certification in cases like *Shumate* where common questions are found not to predominate. See, e.g., *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F. 3d 154 (3d Cir. 2001), discussed and distinguished by the court below at Pet. App. 21a-24a.

In *Blue Bird*, the Fifth Circuit did not even determine whether, on the facts of that case, impact could or could not be proven on a classwide basis. It remanded after stating that if "proof of impact as to each member of the plaintiffs' class could be made in a generalized manner . . . then the conspiracy issue might well predominate over all other individual issues. But, if generalized proof of impact is in fact improper, then the district court must carefully consider whether this requirement of individual proof does not defeat the class certification on either predominance or manageability grounds." 573 F. 2d at 324. There thus is no "decision" of the Court of Appeals in *Blue Bird* denying class certification with which the decision below could conflict.

> each hotel's surcharge was in effect. And while the amount of each hotel's surcharge might constitute prima facie evidence of the amount of damage, the appellants might rebut that evidence by showing what the cost of each hotel's telephone service charge would have been in a competitive market.

Id. at 89. By contrast, the Court of Appeals here found no such complexity.[20] The Ninth Circuit has subsequently found that even the presence of individual questions going to the fact of injury in some small subset of cases does not necessarily defeat predominance. See *Blackie v. Barrack,* 524 F.2d 891, 906 n. 22 (9th Cir. 1975) ("The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones"). And in the Ninth, as in all the other Circuits, many antitrust class actions have been certified in the ensuing decades, despite the need to prove fact of injury. See, *e.g. Thomas & Thomas Rod Makers, Inc. v. Newport Adhesives and Composites, Inc.,* 209 F.R.D. 159 (C.D. Cal. 2002*), petition for permission to appeal pursuant to Rule 23(f) denied* (9th Cir. Sept. 13, 2002); *In re Citric Acid Antitrust Litigation,* 1996 WL 655791 (N.D. Cal. 1996)*; Northwestern Fruit Co. v. A. Levy & J. Zentner Co.,* 116 F.R.D. 384 (E.D. Cal. 1986); *In re Arizona Dairy Products Litigation,* 1983 U.S. Dist. LEXIS 13059 (D. Ariz. 1983); *Brown v. Central Liquor Co.,* 1980 U.S. Dist. LEXIS 17420 (W.D. Okla. 1980); *In re Hawaii Beer Antitrust Litigation*, 1978 U.S. Dist. LEXIS 15905 (D. Hi. 1978); *Presidio Golf Club of San Francisco, Inc. v. National Linen Supply Corp.*,1976 U.S. Dist. LEXIS 11577 (N.D. Cal. 1976).

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[20] The Ninth Circuit itself subsequently explained that *In re Hotel* was reversed because the district court had erred as a matter of law in impermissibly using a fluid recovery procedure to avoid the need for proof of individual damages. *Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301, 1305-06 (9th Cir. 1980).

II. The Holding on Fraudulent Concealment Does Not Create Any Circuit Split, Nor Is the Question About Fraudulent Concealment Presented by Petitioners Even At Issue in This Case.

Petitioners also argue that the decision below conflicts with the Fourth Circuit on the question whether the "inherently individualized" nature of some of the elements of the fraudulent concealment defense to a defendant's invocation of the statute of limitations "precludes class certification" under Rule 23(b)(3). See Pet. 17.

As Petitioners' ultimate reliance on a split among *district* courts may be read to suggest, Pet. App. 20-22, there is no such Circuit split. First, individual issues concerning whether particular claims are time barred do not preclude class certification in the Fourth Circuit. See, e.g., *Central Wesleyan College v. W.R. Grace & Co.* 6 F.3d 177, 189 (4th Cir. 1993). Next, the language from the one Court of Appeals decision Petitioners quote, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F. 3d 331 (4th Cir. 1998), did not even state that case's holding. Third, *Broussard* did not, in fact, even address fraudulent concealment. Nor, finally, was it even decided under the same provision as the instant case.

But in any event, and perhaps even more fundamentally, no question about whether fraudulent concealment might "preclude[] class certification" is even presented in this case, since even a determination in Petitioners' favor on the issue they raise would not result here in the reversal of class certification.

A. Petitioners' Fraudulent Concealment Issue is Not Presented in This Case.

Fraudulent concealment is a defense to a claim that the statute of limitations has run. Here, eighteen months of the twenty-six month class period, which runs from October 1993 to November 1995, fall within the statute of limitations

period. With respect to this eighteen-month period, the questions of fraudulent concealment, or, what is raised by Petitioners, the defenses they may raise to being held responsible for their fraudulent concealment of the conspiracy, are irrelevant. The question Petitioners claim is presented here is thus not at issue in this case. Even if this Court were to accept Petitioners' arguments about fraudulent concealment – arguments that the court below correctly found to be lacking in merit – the class certification determination would not be reversed. At most, what would be required would be a modification of the class definition to exclude the earliest purchases. See *In re Sumitomo Copper Litigation*, 262 F.3d 134, 143 (2d Cir. 2001) (declining to certify an interlocutory appeal under Rule 23(f) of a statute of limitations issue because "any decision by us that the earlier claims were time-barred would result in at most a modification of the district court's certification order."); see also *Waste Management Holdings, Inc. v. Mowbray,* 208 F.3d 288, 297 n.6 (1st Cir. 2000) (if a party opposing certification is able to "demonstrate in the future that individualized statute-of-limitations problems actually shift the balance and undercut the predominance of common issues, the district court may modify its class certification order (or even decertify the class). *See* Fed. R.Civ. P. 23(c)(1).").

The FTC filed its initial administrative complaint against Petitioner Stone Container in May 1998. This tolled the statute back to May 1994.[21] The entire underlying question

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[21] See 15 U.S.C. §16(i) ("Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under [15 U.S.C. §15(a),] the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter. . . "); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.* 401 U.S. 321, 336 (1971) (making clear that this statute tolls the statute of limitations

of fraudulent concealment, itself relevant only where claims would otherwise be time-barred, thus concerns only the earliest few months of the class period.

The Court of Appeals recognized that the fraudulent concealment issue related only to one part of the conspiracy period and that there was unlawful conduct with respect to which no statute of limitations defense could even be asserted by Petitioners, although in dictum it mistakenly stated that the earliest claims that were not time barred arose in May 1995, rather than May 1994. Pet. App. 27a.[22] Petitioners, too, though they agreed below that only the first months occurred outside the limitations period,[23] misleadingly repeating the Court of Appeals' error about the precise date of the last claims that would be time-barred absent their fraudulent concealment, ultimately concede as they must that only "purchases made during [the earlier]

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even with respect to those who were not parties to the government action); cf. Pet. 4-5.

[22] The opinion of the court below says that Respondents "agree on the time period," Pet. App. 27a, by which it seems to mean the time period of the conspiracy. In our briefing below, Respondents were always clear about their understanding of the relevant dates. See Third Circuit Brief for Appellee Box Class at 59-60 ("[O]nly the first months of the conspiracy extend beyond the four year limitation period. The government action was commenced in May 1998 and tolled the statute back to May 1994. Eighteen of the twenty-six months of the class period fall within the limitations period.").

[23] In their briefing below petitioners conceded that the only period to which their fraudulent concealment argument related was the earliest months of the conspiracy, before May 1994: "Defendants have never suggested that the FTC tolling issue requires individualized determinations that would preclude class certification." Third Circuit Reply Brief for Appellants International Paper, *et al.* at 25-26 n. 5; see also Third Circuit Reply Brief for Appellants Georgia-Pacific Corp., at 28 (arguing only that fraudulent concealment was relevant to the "first third" of the class period).

portion of the time period" would be affected by a ruling on fraudulent concealment. Pet. 16a.

Thus, while it is hard not to admire Petitioners' boldness in asserting before this Court that "this case presents a perfect vehicle for addressing the question presented," Pet. 22,[24] this case does not even present the question Petitioners purport to raise. Because by far the largest portion of the conspiracy period is concededly within the statute of limitations, no finding about the significance of individualized questions concerning fraudulent concealment would require reversal of the lower courts' class certification determination. At best it would only alter the class definition to eliminate purchases during the earliest months. Because the fraudulent concealment ruling was not determinative of the class certification decision, no finding about fraudulent concealment would "preclude class certification." Pet. 19.

B. There is No Circuit Split on the Question Whether the Presence of Individualized Issues Relating to Fraudulent Concealment Precludes A Finding that Common Issues Predominate.

Nor, in any event, is there a Circuit split on "the recurring question whether the inherently individualized nature of . . . elements of the fraudulent concealment doctrine precludes class certification." Pet. 17. Contrary to Petitioners' assertion, the Fourth Circuit has not "held that it does." Id. Indeed, the Fourth Circuit itself has affirmed certification of a class where it recognized that an individual limitations issue was present, but did not predominate over the important common issues present, exactly the analysis undertaken by the Third Circuit in the present case. See

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[24] Not to mention their claim that this routine case is "nationally significant," Pet. 16, the "*Amchem*" of "antitrust class actions," id. 1, or an "abuse of the class-action device," id. 2.

Central Wesleyan College v. W.R. Grace & Co. 6 F.3d 177, 189 (4th Cir. 1993).

1. To begin with, the categorical language from *Broussard* relied upon by Petitioners did not state that court's holding. *Broussard* did not adopt any *per se* rule prohibiting class certification in the presence of individualized issues concerning the statute of limitations or its tolling. Indeed, despite the presence of such differences among the putative class members, the Court of Appeals in *Broussard* did not foreclose the certification of a class on remand. See id. at 352 ("[I]t is not inconceivable that [on remand] a class action might be used in a carefully controlled manner to achieve the economies and efficiencies for which that device was intended."). This is consistent with Fourth Circuit caselaw under which class certifications have been upheld despite the presence of individual issues going to the statute of limitations, see *Central Wesleyan*, 6 F. 3d at 189 ("Different time bar defenses may need to be considered depending on when class members have removed asbestos from their building."), and it defeats Petitioners' claim of a Circuit conflict.

Broussard was a highly unusual class certification under which a claim for monetary damages, generally reserved for certification under the opt out provision of Rule 23(b)(3), had been certified under the non-opt out provisions of Rule 23(b)(1) or (2). The Fourth Circuit vacated the class for an amalgam of reasons. The primary reason articulated by the court was the presence of a basic antagonism between the interests of current franchisees and former franchisees who were combined in a single, mandatory class. The court found that this fundamental antagonism going to the heart of the adequacy of representation requirement alone had "seriously infected the class certification." Id at 337-340.

In addition to the fundamental conflict, *Broussard* listed "[f]ive significant variations in franchisees' 'factual and legal arguments,'" id. at 340. These included, *inter alia*, the

fact that the core claims in chief advanced by plaintiffs were based upon oral representations that varied from class member to class member. Id. at 341. The differences among the putative class plaintiffs with respect to the statute of limitations was but one of these five variations, and these taken together led the court to conclude that "[t]he class the district court certified was thus no more than 'a hodgepodge of factually as well as legally different plaintiffs' that should not have been cobbled together for trial . . . . ," id. at 343 (citation omitted), and that certification was therefore improper under the typicality and commonality requirements of Rule 23(a).

The Court of Appeals made clear that it was establishing no "*per se* rule," Pet. 19, precluding class certification, stating "[w]e . . . do not suggest that the commonality and typicality elements of Rule 23 require that members of the class have identical factual and legal claims in all respects. . . ." Id. at 344. And, as described above, it even left open the possibility of class certification on remand.

As one might suspect, then, the Third Circuit did not disagree with any holding of the Fourth Circuit and its decision is not "squarely in conflict" with any "unconditional decision in *Broussard*." Pet. 20. It neither "recognized [a] split" among the Circuits, Pet. 19, nor "expressly took sides," id.

The Third Circuit, rather, performed a similar analysis to that performed by the Fourth Circuit in *Central Weselyan* and *Broussard* and considered the possible individual issues attendant to fraudulent concealment in light of the common issues of conspiracy, injury and concealment in affirming the predominance determination of the district court. In contrast to *Broussard* in which the core claims in chief involved a variety of claims under state law which the Fourth Circuit found involved many individualized issues, the present case involved a single claim in chief charging a violation of the Sherman Act which the Third Circuit found to involve

overriding common issues of proof of conspiracy, impact and concealment. Were the facts and claims remotely similar to the claims and facts of *Broussard,* the Third Circuit would doubtless have reached the same result as had the Fourth Circuit.

Indeed, just a year before the present decision, a panel of the Third Circuit including one of the members of the panel below, vacated for further consideration a class certification in a case which, like *Broussard,* involved, *inter alia,* a core claim in chief based on common law claims involving variant oral representations together with a variety of other individual issues, including possible individual variations relating to a statute of limitations defense. See, *In re LifeUSA Holding Inc.* 242 F.3d 136, 144-47 (3d Cir. 2001). In the instant case, the core claims and many of the issues attendant to fraudulent concealment involved common proof. In *Broussard* and *LifeUSA* they did not. There is no conflict. The cases involved entirely different claims and issues.

As the court below said explicitly, it disagreed only with the "reasoning espoused" in "language" of the Fourth Circuit's opinion "rel[ied] on" by Petitioners, Pet. App. 29a, 32a, language that was part of the much more fact-intensive, and far less categorical, holding. As Petitioners themselves frankly concede, this language amounts only to a "*suggestion* in *Broussard* that class certification was inappropriate whenever the defendant's affirmative defenses (such as the statute of limitations) may depend in facts peculiar to each plaintiff's case." Pet. 19 (emphasis added). By contrast, the *holdings* of both *Broussard* and *Central Weseleyan* make clear that the Fourth Circuit has no *per se* rule prohibiting class certification in the presence of an individualized limitations issue.

2. Furthermore, the language from *Broussard* on which Petitioners rely in making their claim of a split in Circuit authority did not even address fraudulent concealment. *Broussard* was essentially a breach of contract case, not an

antitrust conspiracy case, brought on behalf of a class of Meineke muffler franchisees against Meineke, the franchisor. The statute of limitations would begin to run when each class member discovered the breach, something that the court found could have been discovered through an examination of a 1986 audit prepared and distributed by Meineke to each class member. 155 F.3d at 342. The language about "affirmative defenses" on which Petitioners rely, Pet. 17, referred to the statute of limitations itself, and not to any claim about individualized facts said to defeat a claim that fraudulent concealment tolled the statute of limitations. See 155 F. 3d at 342.

Since the issue in *this* case is "predominance," this is a crucial difference. There, whether the statute of limitations had run with respect to each class member involved *only* individualized questions. Here, by contrast, the primary question, that of the concealment itself, is, as the court below found, a common question susceptible to common classwide proof regarding what petitioners did and said (or failed to do and say) to conceal their unlawful collusion. While, with respect to some class members, there might be some individual questions about discovery and diligence, Rule 23(b)(3) does not require that there be no individual issues, but only that the common issues predominate.

The context in which the issue presented itself in *Broussard*, too, was totally different. There, since each party's entire claim turned on overcoming the statute of limitations, the individual issues described by the Court of Appeals went to the very question of liability. Here, by contrast, because much of the unlawful conduct took place during the limitations period, the question of fraudulent concealment has only to do with the amount of damages to which each member of an otherwise concededly proper class will be entitled.

This was all fully understood by the Third Circuit. It recognized that the core element in fraudulent concealment

was the common issue of defendants' acts of concealment rather than the plaintiffs' conduct. Pet. App. 33a. It fully recognized the individual issue that might be involved in a plaintiff's actual knowledge or due diligence. Id. But it held in the context of this antitrust case – which involved the overwhelmingly common issues of proof of conspiracy, impact, and acts of concealment by defendants – the individual issue which would involve at most a class member's right to recover damages for only the early months of the alleged conspiracy did not predominate over the common issues as a matter of law. Id. at 32a-34a. This is the classic case described in the leading treatise on class actions:

> Challenges based on the statute of limitations, fraudulent concealment, releases, causation, or reliance are often rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability.

Newberg & Conti, Newberg On Class Actions § 4.26 (4th ed. 2002). See also Moore's Federal Practice §23.47[3][c] (4th ed. 2002) ("Absent exceptional circumstances, individual questions concerning fraudulent concealment will not preclude class certifiction.").

And indeed, whatever its view of the individualized issues with respect to the statute of limitations as they arose in *Broussard*, the Fourth Circuit has made clear, contrary to Petitioners' claim, Pet. 17, that it does not view the second and third elements of the fraudulent concealment always to present individualized issues: "[W]ith regard to the third element . . ., the due diligence requirement, it is possible for a plaintiff to satisfy that element without demonstrating that it engaged in any specific inquiry. If the plaintiff establishes that it was not (and should not have been) aware of facts that should have excited further inquiry on its part, then there is

nothing to provoke inquiry." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies*, 71 F. 3d 119, 128 (4th Cir. 1995).

3. Finally, *Broussard* did not even involve a determination on the question of predominance under Rule 23(b)(3) that is presented here. *Broussard* was not even a Rule 23(b)(3) case. Rather, the class there was a very unusual non-opt-out class certified pursuant to either Rule 23(b)(1) or 23(b)(2). See id. at 337 n. 3. These provisions do not contain the "predominance" requirement contained in Rule 23(b)(3) – which was the only issue on which the court below in the instant case ruled. See Pet. App. 29a-34a (holding that the individualized issues do not "predominate" even with respect to fraudulent concealment).[25]

The Fourth Circuit in *Broussard* found that the putative class there could not be certified because of failure to meet the typicality and commonality requirements of Rule 23(a). See *Broussard*, 155 F. 3d at 337-44. As the court there explained, these tests in Rule 23(a) "merge" and together "serv[e] as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Id. at 337 (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982)). The decision there was not based on commonality alone. And the court expressly declined to rule on whether the requirements of Rule 23(b) were met. See id. at 337 n. 3.

In this case, by contrast, the Third Circuit did not address Rule 23(a). See Pet. App. 5a n. 2 ("In the posture of the case presented to us, Appellants are not *ipsis verbis* challenging the district court's determination that the putative classes met

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[25] Predominance under Rule 23(b)(3) was also the only issue on which the other case cited by Petitioners as creating a purported split with *Broussard* ruled. See Pet. 18 (explaining *Waste Management v. Mowbray*, 208 F. 3d 288 (1st Cir. 2000)).

the requirements of Rule 23(a).") It ruled only that, despite any issues involving the discovery of Petitioners' fraudulent concealment or the class members' diligence, Pet. App. 28a, common issues of fact and law still predominated. See Pet. 29a-34a.

The predominance requirement of Rule 23(b)(3) serves a completely different function from the commonality and typicality requirements of Rule 23(a). As this Court has explained, the predominance requirement is concerned with the individual plaintiffs' interest in controlling their own litigations and whether the claims are "sufficiently cohesive to warrant adjudication by representation." See *Amchem*, 521 U.S. at 616, 623. That *Broussard* and the decision below involved these different provisions of law alone of course defeats Petitioners claim of a Circuit split.[26]

III. The Interlocutory Posture in Which This Case Comes to the Court Provides An Independent Reason Certiorari Should be Denied.

Finally, even if Petitioners had shown that review of this case were warranted – something we believe we have definitively demonstrated they have not – certiorari review would still be inappropriate because of the procedural posture in which this case comes to the Court.

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[26] In tacit acknowledgment that they have not come up with a Circuit split, Petitioners cite what they claim is a division of authority among *district* courts, Pet. 20-21. They claim that there is less Court of Appeals case law on this issue because prior to the 1998 adoption of Rule 23(f), interlocutory appeals to the Courts of Appeals of class certification orders were often unavailable. Pet. 21. While this Court of course does not sit in any event to resolve conflicts among district courts, if Petitioners' assessment is correct, it cuts against them. If the district courts are, in fact, in disarray, the recently-created availability of Rule 23(f) review will permit the Courts of Appeals ample opportunity to weigh in on this issue. Should an actual Circuit split emerge, this Court could, of course, grant certiorari at that appropriate time to resolve it.

This is an appeal of an interlocutory class certification order. Review of such interlocutory orders by way of writ of certiorari is ordinarily inappropriate. See, e.g., *American Construction Co. v. Jacksonville T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893) ("this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment of the cause"); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). This is particularly true of class certification orders, that are themselves conditional, and "subject to revision in the District Court. Fed. R. Civ. P. 23(c)(1)," *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 469 (1978), based on further evidentiary and other developments during the course of the proceedings.

As this Court's long history with questions certified for interlocutory review pursuant to 28 U.S.C. §1292(b) makes clear, the availability of a procedural mechanism for seeking interlocutory review of certain questions in the Court of Appeals has no effect on the rule that this Court will not ordinarily exercise its certiorari jurisdiction to hear interlocutory appeals. See, e.g., Stern, Gressman, Shapiro and Geller, Supreme Court Practice, §4.19, at 261 (8th Ed. 2002). Given this, it is not surprising that this Court has never granted certiorari to review a case in this posture, i.e., one seeking review of an interlocutory judgment granting class certification heard by the Court of Appeals pursuant to Fed. R. Civ. P. 23(f).

CONCLUSION

The petition for writ of certiorari should be denied.

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IN THE
Supreme Court of the United States

GAYLORD CONTAINER CORP., *et al.*,
Petitioners,
v.
GARRETT PAPER, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIAE THE BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICUS CURIAE THE BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae The Business Roundtable is an association of approximately 150 chief executive officers of leading corporations with a combined workforce of more than ten million employees in the United States and about $3.7 trillion in revenues.[1] The executives who created The Business

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. Three of the petitioners, Georgia-Pacific Corporation, International Paper Company and Pactiv Corporation (formerly Tenneco Packaging, Inc.), are

Roundtable believed that the U.S. economy would be healthier and the interest of the public would be better served if there were more cooperation and less antagonism among various sectors of society. They concluded that one way business could be a more constructive force and have a greater impact on policymaking was to bring the chief executive officers more directly into public debate. Therefore, The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

Among other things, The Business Roundtable's member chief executives have taken an active interest in the operation and administration of the country's civil justice system, and have advocated on behalf of efforts to reform the system in order to assure more fair, equitable and efficient treatment of all of its participants, including members of the Nation's business community.

The questions presented in this petition have tremendous practical importance for The Business Roundtable's members, many of whom are involved in antitrust litigation, both as plaintiffs and defendants, or other types of class action litigation in the federal courts. Because of the enormous stakes at issue in class actions seeking monetary damages—particularly in antitrust cases—and the substantial likelihood that erroneously certified class actions will settle without any adjudication on the merits, The Business Roundtable believes that courts must rigorously enforce the requirements for class certification to ensure that it is used only where classwide, rather than individual, issues are truly at stake.

The Third Circuit's opinion, by contrast, paves the way for private plaintiffs to pursue antitrust class actions on behalf of tens of thousands of unnamed class members who made

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members of The Business Roundtable. Letters of consent from all parties have been filed with the Clerk of the Court.

millions of individual purchases, even where it would require an individualized inquiry to determine whether each class member suffered injury-in-fact—an essential element for any private antitrust claim. More generally, the approach endorsed by the Third Circuit poses a significant risk to class action defendants because it would permit class certification even where individualized issues central to a finding of liability permeate an action. The court's decision conflicts with the approach taken by other circuits, thereby creating an uncertainty in the law that is harmful to the business community. The Business Roundtable is concerned that if the Third Circuit's decision remains in place, it will threaten businesses with exposure to sprawling class action lawsuits against which they could not effectively defend themselves, thereby creating an inexorable pressure to abandon meritorious defenses and settle frivolous lawsuits. Given the extraordinary confusion in the lower courts on these issues, and the elusiveness of appellate review in this area, this case presents an ideal vehicle to resolve that confusion.

STATEMENT OF THE CASE

This case concerns allegations that petitioners—vertically integrated manufacturers and sellers of linerboard and of corrugated boxes and sheets made from that material—conspired, over a two-year period in the early 1990s, to reduce the output of linerboard in order to raise the price of boxes and sheets. *See* Pet. 4. Respondents are small purchasers of corrugated boxes and sheets seeking to represent a class comprised of all entities and individuals who purchased corrugated boxes or sheets during the time of the alleged conspiracy. *Id.* at 6. This class would include some of the largest corporations in the world, as well as tens of thousands of other consumers who buy boxes. *Id.*

Respondents sought class certification, and petitioners argued, among other things, that certification was inappropriate because the fact of antitrust injury to each class member was not susceptible to classwide proof, and because indi-

vidualized issues would predominate given respondents' reliance on the fraudulent concealment doctrine to overcome the applicable statute of limitations. Petitioners presented evidence concerning variations in the arrangements by which purchasers buy boxes and sheets, which variations could plainly affect the existence of injury-in-fact. Likewise, petitioners explained the individualized determinations that would be required for each class member to make the requisite showing of "due diligence" in order to benefit from the fraudulent concealment doctrine. The district court rejected both of these arguments and certified both classes.

The Third Circuit agreed to consider the district court's certification order pursuant to Fed. R. Civ. P. 23(f), *see id.* 35a-36a, but affirmed that order. *Id.* at 3a-34a. The court noted that respondents *might* be able to prove the fact of injury to each class member based, in part, on respondents' experts opinion that all class members would have been injured. *Id.* at 15a. Although these experts did not commit to any particular method of proving classwide injury, the court concluded that the experts' opinions were significant because they were "supported by charts and studies." *Id.*

The Third Circuit also rejected petitioners' argument on the fraudulent concealment issue, and held that the required showing of "due diligence" on the part of each class member would not result in individual issues predominating in the case. *Id.* at 32a. Despite a Fourth Circuit opinion to the contrary, the court concluded that "common issues of concealment predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what the plaintiffs did." *Id.* (quoting *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 488 (W.D. Pa. 1999)).

SUMMARY OF ARGUMENT

Class certification decisions are of great significance in this country's civil justice system. By allowing an exception to the rule that cases are litigated only by actual parties, class

actions expose defendants to enormous and highly unpredictable liability. As many courts and commentators have recognized, the practical effect of a decision to certify a class is often settlement, regardless of the merits of the claims or the viability of available defenses. It is therefore of overriding importance that courts rigorously enforce the requirements of Rule 23 to ensure that classwide issues in fact predominate over individual ones and that class adjudication is in fact a superior method.

The court below, parting ways with other circuits, ignored these concerns and upheld certification of an antitrust class even though two key liability issues—the existence of antitrust injury-in-fact and fraudulent concealment—each depend on individualized inquiries that cannot be adjudicated on a classwide basis. The Third Circuit brushed away these concerns by stating that plaintiffs' experts had presented "charts and studies" supporting their view that antitrust injury *might* be susceptible of classwide proof, and that the question of fraudulent concealment involved some common issues in addition to individual ones. The court's conclusory holdings not only conflict with those of other circuits but, if allowed to stand, would markedly lower the bar to class certification in antitrust and other actions, in a manner that will have deleterious effects on businesses attempting to defend against baseless claims.

There is no cause for the Court to delay in resolving the widespread confusion in the law. Given the general lack of opportunity for appellate review of decisions to certify classes, the lower courts are hopelessly divided on the issue. And given the discretionary nature of circuit court review under Rule 23(f) and the effective lack of post-judgment review of erroneous certification decisions, the opportunities for this Court's intervention, if not exercised here, will continue to dwindle. That is because once an issue becomes settled law in a circuit, as these issues have now become in the Third Circuit, it is highly unlikely that that court would

certify the same issue for appellate review, denying this Court an opportunity to correct errors in the future.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD ENSURE THAT CERTIFICATION DECISIONS ARE CAREFULLY SCRUTINIZED GIVEN THEIR POTENTIAL TO DEPRIVE DEFENDANTS OF THE ABILITY TO PRESENT MERITORIOUS DEFENSES

1. This Court has long recognized that the "class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 155 (1982) (citation and quotations omitted). Thus, a class action "may only be certified if the trial court is satisfied, after a *rigorous* analysis," that certification is justified. *Id.* at 161 (emphasis added). And as the Court has emphasized more recently, "[t]he Rules Enabling Act underscores the need for caution," because "no reading of the [class action] Rule can ignore the Act's mandate that rules of procedure 'shall not abridge, enlarge, or modify any substantive right.' " *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (quoting 28 U.S.C. § 2072(b)) (citation and quotation omitted). *See also Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997).

The Court has also recognized another feature of class certifications that is of particular importance to The Business Roundtable and its members: namely, that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). As Judge Posner has elaborated, class certification creates an "intense pressure to settle" despite the availability of meritorious defenses, leading to a legitimate judicial concern over "blackmail settlements." *In re Rhone-Poulenc Rorer Inc.*,

51 F.3d 1293, 1298 (7th Cir.) (citation and quotation omitted), *cert. denied*, 516 U.S. 867 (1995).

Other courts have sounded the same concern. For example, as the Fifth Circuit has noted:

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. [*Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted)].

Even the Third Circuit earlier recognized this fact. *See Newton* v. *Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 167-168 (3d Cir. 2001) ("Irrespective of the merits, certification may have a decisive effect on litigation [because] granting certification may generate unwarranted pressure to settle nonmeritorious or marginal claims.").[2] Commentators have likewise reached the same conclusions.[3]

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[2] *See also Rutstein* v. *Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (only thing gained from certification was "the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement"), *cert. denied*, 532 U.S. 919 (2001); *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974) (Duniway, J., concurring) ("I doubt that plaintiffs' counsel expect the immense and unmanageable case that they seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust."), *cert. denied*, 421 U.S. 963 (1975).

[3] *See, e.g.*, Robert G. Bones & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251 (2001); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 Tenn. L. Rev. 1 (2001); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stanford L. Rev. 497, 499 (1991) (in securities class

These concerns are particularly acute to The Business Roundtable and its member CEOs because "[m]any corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Thus, "some plaintiffs or even some district judges may be tempted to use the class device to wring settlements from defendants whose legal positions are justified but unpopular." *Id.* *See* Bones & Evans, *supra*, at 1301 ("[I]t sometimes seems as if the high probability of class settlement is the cause of a liberal judicial attitude toward certification: certification followed by settlement removes many cases from the court docket without the need for trial and with minimal risk of reversal on appeal.") And as commentators have noted, there is "a correlation between class action settlement and frivolous litigation." *Id.* at 1291-94. That is because the class action "magnifies the stakes through aggregation," "increases the defendant's risk bearing, litigation, and reputation costs," and "enlists the trial judge in the settlement process." *Id.* at 1294-95.

2. The Third Circuit's ruling, if allowed to stand, will engender precisely the type of unfair, coercive pressures this Court and other courts have warned against. The cavalier manner in which the courts below permitted the class in this case to be certified is the antithesis of the "rigorous analysis," *Falcon*, 457 U.S. at 161, required by this Court's precedents. Rather than requiring plaintiffs to demonstrate that liability can, in fact, be adjudicated on a classwide basis, the court simply accepted the conclusory representations of plaintiffs' experts, supported by unspecified "charts and studies," that

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actions, "settlements are not voluntary in that trial is not regarded by the parties as a practically available alternative for resolving the dispute, and they are not accurate in that the strength of the case on the merits has little or nothing to do with determining the amount of the settlement").

the requisite antitrust injury *might* be susceptible to classwide proof. Likewise, the court simply ignored the individual issues that must be proven by each class member in order to sustain a claim of fraudulent concealment sufficient to toll the statute of limitations.

Other courts have rejected this casual "certify now and find out later" approach. Indeed, while still sitting on the D.C. Circuit, then-Judge Ginsburg (with Judge Edwards) recognized the dangers of accepting, without close scrutiny, the allegations of putative class action plaintiffs made in support of a certification motion. In *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987), plaintiffs argued that variations in state law were "academic" and immaterial, and therefore did not defeat Rule 23(b)'s predominance requirement. *Id.* The D.C. Circuit aptly concluded that "[a] court cannot accept such an assertion 'on faith.' " *Id.* Instead, a district court must make a "considered predomination determination" in order to justify certifying a class. *Id.* at 1017. Moreover, the court reiterated that the burden is on the class proponents to prove that the requirements of Rule 23 are satisfied. *Id. See also Castano*, 84 F.3d at 742 ("Given the plaintiffs' burden, a court cannot rely on assurances of counsel that any problems with predominance or superiority can be overcome."); *Szabo* v. *Bridgeport Mach., Inc.*, 249 F.3d 672, 677 (7th Cir.) ("similarity of claims and situations must be demonstrated rather than assumed"), *cert. denied*, 534 U.S. 951 (2001).

Likewise, in a case involving the same antitrust injury-in-fact issue presented in this case, the Ninth Circuit also required a district court to do more than simply trust a plaintiff concerning the propriety of certification:

> The District Court in this case has relied on the "imagination" of appellees' counsel to provide solutions that will, at some point in the future, prevent these individual issues from splintering the action into thousands of individual trials requiring years to litigate. Thus far the ap-

> pellees have not been able to demonstrate to our satisfaction that the individual questions will not overwhelm the common questions, unless some of the required elements or allowed defenses in respect to the alleged claims are eliminated or impaired. The issues raised by the apparent existence of numerous individual questions must be resolved before a class is certified. [*In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).[4]]

As shown above, a decision to certify a class will often dictate the outcome of a case, forcing settlement and thereby effectively depriving defendants from the ability to present meritorious defenses. Accordingly, courts must take particular care to ensure that claims that are alleged to present common issues are, in fact, susceptible of classwide treatment. In this case, both the injury-in-fact and the fraudulent concealment issues would necessarily require a searching look at *each* class member—tens of thousands of purchasers of corrugated boxes and sheets over a two-year period—before antitrust liability could be established. For example, each purchaser interacted with the defendants under different market conditions and on different contractual terms, and thus some purchasers may have suffered no harm whatsoever

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[4] *See also Sandwich Chef of Texas, Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 221 (5th Cir. 2003) ("Although expert testimony * * * might convince the trier of fact to find in [plaintiffs'] favor, such opinion evidence would not justify excluding proof demonstrating a lack of reliance by individual plaintiffs."); *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (*en banc*) ("where the court finds, on the basis of substantial evidence as here, that there are serious problems *now appearing*, it should not certify the class merely on the assurance of counsel that some solution will be found") (emphasis in original), *cert. denied*, 435 U.S. 968 (1978); *Kline*, 508 F.2d at 236 n.8 (rejecting plaintiffs' proffer of generalized proof, noting that Rule 23 "does not eliminate the need for individual proof" and does not "foreclose the right of each defendant to assert his defenses").

from the alleged scheme to decrease output. Yet the Third Circuit ignored these concerns, concluding on the basis of unspecified "charts and studies" that antitrust injury could be proven as to the *entire* class. Likewise, the court simply ignored the fact that establishing fraudulent concealment requires a plaintiff-by-plaintiff factual inquiry into what that plaintiff knew or did not know about the alleged scheme.

This ruling effectively denies petitioners the ability to present meritorious defenses and to be confronted with the requisite individualized proof with regard to purchasers who have, in fact, suffered no antitrust injury at all, and it permits those purchasers (and class counsel) to reap undeserved windfalls. In order to certify a class, the susceptibility of classwide treatment must be demonstrated by the plaintiffs, not simply presumed. This Court should grant review to ensure that the lower courts follow that rule.

II. THE COURT SHOULD RESOLVE THE WIDESPREAD CONFUSION IN THE LOWER COURTS AS TO THE PROPRIETY OF CERTIFYING ANTITRUST CLASS ACTIONS DESPITE THE PRESENCE OF INDIVIDUALIZED ISSUES

This case is also of great importance to the Nation's business community because the questions presented have divided the lower courts for years, creating intolerable uncertainty and unpredictability in the law. Moreover, the decision below, by depriving defendants of the ability to demonstrate that individual plaintiffs have no valid claims, improperly allows plaintiffs to use the procedural class action device as a mechanism to alter defendants' substantive rights. Accordingly, the Court should grant certiorari to resolve the conflict and ensure that class certification in antitrust actions is strictly limited to cases susceptible to classwide resolution.

1. As this Court has made clear, in order to prove liability in a private antitrust action, a plaintiff must prove that it was injured in fact as a result of the alleged antitrust viola-

tion. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). Antitrust injury is not simply a question of damages but is rather an element of a private plaintiffs' *substantive* cause of action. That is because Section 4 of the Clayton Act only permits a private antitrust plaintiff to recover damages when the plaintiff "is injured in [its] business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15.

As shown in the petition, the lower courts are hopelessly divided as to the circumstances under which class certification is appropriate in antitrust cases. Contrary to the decision in this case—in which the Third Circuit was quick to rely on the conclusory and tentative opinions of the plaintiffs' experts in affirming class certification—other courts have recognized that the individualized issues of antitrust injury are not susceptible to classwide treatment.

In *Windham* v. *American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), the *en banc* Fourth Circuit addressed whether the antitrust injury requirement is susceptible to classwide proof, and concluded that in a private antitrust action, "the issues of injury and damage remain the critical issues * * * and are always strictly individualized." *Id.* at 66. Thus, the court held that "[g]eneralized or class-wide proof of damage in a private antitrust action would, * * * contravene the mandate of the Rules Enabling Act that the Rules of Civil Procedure 'shall not abridge, enlarge, or modify any substantive right.' " *Id.* (quoting 28 U.S.C. § 2072) (footnote omitted). As the court held, the "highly individualized character of the proof of injury and damages" precluded class certification because "the claims could not be proved by any set method of math-

ematical or formula calculation but would require individual proof and trial." *Id.*[5]

The Ninth Circuit reached the same conclusion in an antitrust class action presenting some of the same issues—including the individualized antitrust injury issue—as the instant case. In *In re Hotel Telephone Charges*, 500 F.2d at 89, the Ninth Circuit held that "[u]nless the court is to allow the procedural device of the class action to wear away the substantive requirements to maintain a private antitrust cause of action, this suit raises far too many individual questions to qualify for class action treatment." The court also specifically addressed the plaintiffs' efforts to concoct methods of presenting the required proof on a classwide basis, and concluded that such methods "significantly alter[ ] substantive rights under the antitrust statutes," in violation of the Rules Enabling Act. *Id.* at 90.

Other courts have likewise held that class certification in antitrust cases is inappropriate without a readily identifiable method for demonstrating that each class member had in fact been injured by the alleged antitrust violation—thereby giving them standing under Section 4 of the Clayton Act. For example, in *Alabama* v. *Blue Bird Body Co.,* 573 F.2d 309 (5th Cir. 1978), the Fifth Circuit held that, in light of the essential elements of an antitrust claim, antitrust " 'impact' is a question unique to each particular plaintiff and one that must be proved with certainty." *Id.* at 327. Because of the

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[5] The *Windham* court noted that class certification may be appropriate for claims involving markets in which the showing of injury on behalf of class members would be "virtually a mechanical task, capable of mathematical or formula calculation." *Id.* at 68 (citations and quotations omitted). That is plainly not the case here. Given the variations in the arrangements by which purchasers in the box and sheet markets bought products, this case certainly does not present the type of facts conducive to a "mechanical" showing of injury.

"diverse nature" of the market at issue in *Blue Bird* and the absence of any "manageable manner" for ensuring that each class member had in fact been injured, the court concluded that class certification was not appropriate. *Id.* at 328 (emphasis removed). *See also Shumate & Co.* v. *National Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147, 155 (5th Cir.) (finding no predominance in light of requirement of "proof of injury" to each putative class member), *cert. denied*, 423 U.S. 868 (1975); *Weisfeld* v. *Sun Chem. Corp.*, 210 F.R.D. 136, 142-145 (D.N.J. 2002); *Gerber* v. *Delta Airlines, Inc.*, 1996-2 Trade Cas. ¶ 71,538 (N.D. Ga. 1996).

By contrast, other courts—in line with the Third Circuit in this case—have taken a much more liberal approach towards the propriety of class certification, accepting bare assertions that injury can be proven on a classwide basis. For example, in *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 136-137 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 2382 (2002), the Second Circuit recently held—over a vigorous dissent—that certification was appropriate where the plaintiffs' expert posited that a model could be constructed to show classwide economic impact, despite considerable evidence indicating that variations among class members made such a showing impossible. Some district courts have likewise concluded that an expert opinion suggesting the possibility of classwide proof of injury is sufficient to justify certification of a class—even where the actual evidence shows individualized variations among class members.[6]

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[6] *See, e.g., In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 266 (D.D.C. 2002) (holding that at the class certification stage, plaintiffs "need only demonstrate that they intend to use generalized evidence which is common to the class and will predominate over individualized issues with respect to proving impact"); *Paper Sys. Inc.* v. *Mitsubishi Corp.*, 193 F.R.D. 601, 612-616 (E.D. Wis. 2000) (concluding that accepting defendants' arguments concerning the availability of classwide proof in injury was inappropriate at certification stage because it addressed merits).

Others have gone even further, holding that in order to satisfy the injury-in-fact requirement, "[p]laintiffs are not required to show that the fact of injury actually exists for each class member." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 307 (E.D. Mich. 2001). *Accord, In re Terazosin Hydrochloride Antitrust Litig.*, 203 F.R.D. 551, 558 (S.D. Fla. 2001). And only recently, one district court, relying on the Third Circuit's decision in this case, concluded that, in order have a class certified, the plaintiff "need not establish now that there is class-wide antitrust impact." *In re Mercedes-Benz Antitrust Litig.*, __ F. Supp. 2d __, 2003 WL 556359, at *10 (D.N.J. Feb. 19, 2003).

Likewise, the courts that have addressed the amenability of the fraudulent concealment doctrine to classwide treatment have reached conflicting conclusions. In *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998), the Fourth Circuit held that the individual inquiries required by the application of that doctrine—including the necessity of a showing of due diligence by any plaintiff seeking to toll an applicable statute of limitations—preclude class certification. On the other hand, the First Circuit rejected such a rule and concluded that common issues could predominate, even where fraudulent concealment is an issue. *See Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 296 n.4 (2000). Moreover, as the petition points out, a raft of district court decisions going each way also highlights the recurring nature of the fraudulent concealment doctrine in class action litigation and the significantly different approaches courts have taken in addressing it. *See* Pet. 20-21.

The differences in approach between the courts addressing the susceptibility of the antitrust injury requirement and the fraudulent concealment doctrine to class treatment are real and significant. In particular with respect to the antitrust injury issue, most circuits recognize that certification is only appropriate where classwide evidence would be able to prove injury to *each* class member and not in cases, like this one,

where variations in the positions of the putative class members make such classwide proof impossible. By contrast, a minority of courts, including the Third and Second Circuits, ignore such individualized variations and allow plaintiffs to theorize about, rather than demonstrate, the existence of classwide issues. The court should grant certiorari to ensure that the standards for certification in antitrust cases do not vary based solely upon where a plaintiff chooses to sue.

2. The questions presented in this case are not academic inquiries, but rather have widespread impact on businesses. As evidenced by the numerous cases cited above and in the petition, the issues raised here are recurring ones over which the courts have differed sharply. The decision below, moreover, has profound consequences for businesses facing antitrust claims brought on behalf of a putative class. For if the Third Circuit's decision is allowed to stand unreviewed, it will eliminate the ability of businesses to defend key elements of such cases.

As this Court has held, "Rule 23's requirements must be interpreted in keeping with * * * the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' " *Amchem*, 521 U.S. at 613 (quoting 28 U.S.C. § 2072(b)); *see also Ortiz*, 527 U.S. at 845. To allow the purely procedural device of class certification to abridge, enlarge, or modify substantive rights would, in essence, contravene parties' right to due process by determining substantive rights not yet litigated on their merits. Yet that is precisely what the decision below does. By permitting certification based on generalized expert testimony regarding classwide antitrust injury, and by ignoring differences among class members as to elements of fraudulent concealment, the decision effectively eliminates the ability of antitrust defendants to demonstrate that individual class members fail to satisfy these elements.

In *Broussard*, the Fourth Circuit faced a case involving the same issues as this case: the "inherently individualized" proof of actual injury and individualized issues concerning the fraudulent concealment doctrine. 155 F.3d at 342-343. As in this case, the plaintiffs in *Broussard* sought to overcome these problems with experts who attempted to supply the requisite proof with averages and samples but without considering actual proof as to any particular class member. *Id.* at 343. Unlike the Third Circuit here, however, the Fourth Circuit held that this use of "hypothetical or speculative" evidence was an improper "shortcut" that "should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Id.*

The *Broussard* court further recognized that under the approach permitted by the district court, "plaintiffs enjoyed the advantage of litigating not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation," *id.* at 344, while the defendant was "often forced to defend itself against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Id.* at 345. The court appropriately concluded that this all-too-common method of class action litigation ran afoul of the Rules Enabling Act.

By allowing plaintiffs to establish classwide liability on the basis of generalized, theoretical assertions of antitrust injury, the Third Circuit put the defendants in the same precarious position discussed in *Broussard* of being forced to defend against abstract, generalized proof. In doing so, the Third Circuit allowed class certification to abridge defendants' substantive rights in violation of the Enabling Act. Because antitrust injury is a substantive element of any antitrust plaintiffs' cause of action, the Third Circuit's decision allowing injury to be proven on a classwide basis through generalized testimony abridges defendants' substantive rights.

The same is true for the court's holding that plaintiffs can litigate the applicability of the statute of limitations on a classwide basis notwithstanding individualized issues on the question of fraudulent concealment. As the Fourth Circuit also recognized in *Broussard*, the fraudulent concealment doctrine—complete with its requirement of proof of due diligence by plaintiffs seeking to overcome a statute of limitations—does not lend itself to class treatment. 155 F.3d at 342; *see also* Pet. 16-22. Rather than taking seriously the individual issues that would necessarily accompany that doctrine, the Third Circuit simply accepted the plaintiffs' argument that common issues would predominate because the focus would be on the defendants' acts of concealment. *See* Pet. App. 26a-34a. This type of conclusory analysis fails to honor the instruction of the Enabling Act that substantive rights not be abridged by Rule 23. The approach of the lower courts in this case ran afoul of that Act and effectively deprived petitioners of their substantive right to be free of time-barred claims.

For these reasons, the Court should grant review to ensure that the procedural mechanism of Rule 23 is not improperly used as a means of depriving antitrust defendants of their ability to assert and litigate their substantive rights.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE CONFUSION IN THE LAW

There is no cause for the Court to delay reaching the important issues presented in the petition. The issues were squarely presented below, and the circumstances of class certification decisions—the difficulty in obtaining interlocutory review combined with the effective lack of post-judgment review—counsel strongly in favor of certiorari.

Considering the importance of class certification decisions, it is remarkable how little guidance is available from this Court's previous decisions. Since the Court's seminal decision more than 20 years ago in *Falcon*, *supra*, the Court

has directly considered the application of Rule 23's standards only twice, in *Amchem*, *supra*, and *Ortiz*, *supra*—and in all three of these cases the Court reversed decisions to certify classes. The scarcity of appellate case law is largely attributable to two factors: (1) the general absence of interlocutory review before the 1998 enactment of Rule 23(f), which allows such review on a wholly discretionary basis; and (2) the fact that cases generally settle following certification thereby precluding post-judgment review. As a result, the authority relied on by most district courts when making certification decisions often is limited to "decisions by other district judges, most in cases later settled and thus not subject to appellate consideration." *Szabo*, 249 F.3d at 675.

Now that numerous courts of appeal have weighed in on the questions presented by this petition, and substantially different approaches have emerged, the time has come for this Court to intervene. If the Court does not, the issues will increasingly evade review, leaving the lower courts hopelessly mired in confusion. For once a circuit has decided an issue, as the Third Circuit has done here, that circuit will likely not grant discretionary review under Rule 23(f) in future cases raising the same issue. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (Rule 23(f) review appropriate only where certification decision "is questionable, taking into account the district court's discretion," "presents an unsettled and fundamental issue of law," or is "manifestly erroneous"); *Newton*, 259 F.3d at 163-165 (3d Cir. 2001); *Blair*, 181 F.3d at 834-835. Thus, because class certification decisions—particularly in large-scale antitrust cases—are effectively unreviewable after judgment given the pressures to settle, once a circuit decides an issue and this Court denies certiorari, the issue may never again make its way to this Court from that circuit. And given that plaintiffs often have a choice of circuits in which to file nationwide class actions, such actions will increasingly concentrate in those circuits with lenient certifi-

cation rules that are effectively insulated from further review. Therefore, this Court's failure to review this case would encourage forum shopping by plaintiffs.

The Court should not let this opportunity pass to provide needed clarity and certainty to both the lower courts and the business community. Additional certainty in this tremendously important area of the law would benefit the Nation's business community and would help do away with the lottery system that currently prevails, where the level of scrutiny applied by a particular court to a class certification motion often makes the difference between a case being dismissed and a multimillion dollar settlement. Given the importance of these recurring issues, this Court should step in and require the lower courts to rigorously analyze requests for class certification to ensure strict compliance with the requirements of Rule 23 and the Rules Enabling Act.

CONCLUSION

For the foregoing reasons, as well as those presented in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 2002

GAYLORD CONTAINER CORP., GEORGIA-PACIFIC CORP., INTERNATIONAL PAPER CO., JEFFERSON SMURFIT CORP., PACKAGING CORPORATION OF AMERICA, INC., SMURFIT-STONE CONTAINER CORP., STONE CONTAINER CORP., TEMPLE-INLAND, INC., TENNECO, INC., TENNECO PACKAGING, INC., UNION CAMP CORP., AND WEYERHAEUSER CO.,

Petitioners,

v.

GARRETT PAPER, INC., GENERAL REFRACTORIES CO., ALBERT I. HALPER CORRUGATED BOX CO., LOCAL BAKING PRODUCTS, INC., AND OAK VALLEY FARMS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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I. The Third Circuit Erred, And Deepened A Circuit Conflict, By Holding That The Fact Of Individual Injury In Antitrust Cases Can Be Established On A Classwide Basis.

Respondents first argue that the question whether fact of injury can be established on a classwide basis in antitrust cases is "factbound," Opp. 9, and that the decision below thus raises no legal issue of any importance. That argument is unavailing.

Respondents begin by asserting that the Fourth Circuit's landmark decision in *Windham v. American Brands, Inc.*, 565 F.2d 59 (1977) (*en banc*), did not adopt any bright-line rule that the fact of injury is invariably an individual question. *See* Opp. 10-12. That assertion, however, contradicts *Windham*'s categorical holding that "[w]hile [an antitrust] case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are *always* strictly individualized." 565 F.2d at 66 (emphasis added). Contrary to respondents' suggestion, this was not dicta, but holding: the Fourth Circuit held that class certification was improper in *Windham* precisely because the fact of injury is an essential element of liability that requires an individualized inquiry. *See id.* at 66-72. The fact that the Fourth Circuit reviewed the district court's decision not to certify a class under a deferential standard of review, *see* Opp. 10, or that the court ultimately also held that the district court correctly rejected the use of a "fluid recovery" theory of *damages*, *see* Opp. 10-11 n.14, in no way detracts from that core holding.[1]

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[1] Contrary to respondents' repeated assertions, *see, e.g.*, Opp. 9, petitioners do not contend that *Windham* established a *per se* rule against class certification in antitrust cases. Instead, *Windham* merely held that the fact of injury must be treated as an individualized issue, whether in applying the predominance requirement of Rule 23(b)(3) or any of the other requirements of Rule 23. On that critical issue, *Windham* expressly rejected the Third Circuit's contrary holding in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), on which the Third Circuit relied below, *see* Pet. App. 10a-13a, 18a, and instead endorsed the dissent in *Bogosian*, *see* 565 F.2d at 71 n.36.

In a similar vein, respondents assert that *Windham* is distinguishable because the plaintiffs there alleged "extraordinarily complex conspiracies . . . that involved different actions and different consequences at different auctions, on different days, and in different weeks." Opp. 12 n.16. That assertion, however, is disingenuous, because at least some of the *Windham* plaintiffs alleged that defendants *directly fixed* the price of the product plaintiffs had purchased. *See* 565 F.2d at 64, 67. Thus, if anything, the claims at issue here present a *more* compelling context for holding that the fact of injury requires an individualized inquiry than *Windham*, because the tens of thousands of putative class members here concededly purchased *different products* (corrugated boxes and sheets) from the one as to which a reduction in output was alleged (linerboard) in millions of individual transactions across the Nation for more than two years, and their claims thus present an array of complex causation questions that do not arise in direct price-fixing cases.[2] Put in the language of *Windham*, this is the sort of case in which the fact of injury "does not lend itself to . . . a mechanical calculation," and thus class certification is manifestly inappropriate. *Id.* at 68.

Respondents finally assert that the Fourth Circuit could not have meant what it said in *Windham* because it has had "ample opportunity" to reaffirm *Windham* but has failed to do so. Opp. 11 n.15. Far from backing away from *Windham*, however, the Fourth Circuit recently cited it approvingly for the proposition

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[2] For this reason, respondents' insistence that they are "*direct* purchasers of corrugated boxes and sheets," Opp. 1 (emphasis added), is misleading. While respondents and their putative class members did indeed "directly" purchase corrugated boxes and sheets from petitioners, they did *not* directly purchase linerboard, the product as to which a reduction in output is alleged. Whether an alleged conspiracy to restrict the output of *linerboard* raised the price of *corrugated boxes and sheets* presents complex causation questions that simply cannot be answered on a classwide basis: an increase in the price of linerboard may or may not be reflected in an increase in the price of corrugated boxes and sheets for a variety of individualized reasons.

that the need for individualized proof of injury "may defeat predominance" where (as in the antitrust context) such proof is "essential to liability." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 147 (2001); *accord Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) ("In *Windham* we held proof of damages was 'always strictly individualized,' and we invalidated '[g]eneralized or class-wide proof of damages' because proof of actual, individual damages was a critical element of a plaintiff's antitrust claim."). Although respondents correctly note that several district courts in the Fourth Circuit have certified classes in antitrust cases, *see* Opp. 11-12, none of those decisions questions *Windham*, and, for that matter, none of those decisions has been reviewed on the merits by the Fourth Circuit.

Respondents' efforts to distinguish cases from the Fifth and Ninth Circuits are similarly unavailing. In *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147 (1975), the Fifth Circuit upheld the denial of class certification on the ground that, in antitrust cases, "the proof of injury to business or property of each class member is critical for the determination of defendants' liability to any individual." *Id.* at 155. The court expressly distinguished cases in which "liability can be shown as to all class members, with only the amount of damage to be determined as to each." *Id.* Contrary to respondents' insinuation, *see* Opp. 16 n.19, nothing in *Shumate* suggests that the latter category includes antitrust cases.

To be sure, as noted in the petition, *see* Pet. 13 n.2, the Fifth Circuit did suggest in *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (1978), that there might be some antitrust cases in which the fact of injury might not require an individualized inquiry, *see id.* at 327 & n.34. As the Fifth Circuit made clear, however, these would be cases alleging "an unlawful overcharge with respect to a homogeneous or fungible product which was marketed in a similar manner throughout the country," such that "'impact' and 'buyer' become almost synonymous, and, therefore, once the illegal overcharge as to

the homogeneous products has been established, it is most reasonable to assume 'injury' or 'impact' upon a showing of proof of purchase." *Id.* at 324. This is unquestionably not such a case: as noted above, this case involves allegations that the defendants conspired to reduce supply of a product (linerboard) *other* than the product the plaintiffs purchased (corrugated boxes and sheets).[3] In such a case, injury to every purchaser is not guaranteed, because the price any given purchaser paid for corrugated boxes and sheets may or may not have been affected by the price of linerboard, so that mere "proof of purchase" would not establish injury. *Id.* at 327 n.34.[4] It is simply impossible to determine, absent individualized mini-trials, what factors affected the price of corrugated boxes and sheets purchased by respondents and their tens of thousands of putative class members across the Nation for more than two years.

Finally, the decision below also conflicts with the Ninth Circuit's decision in *In re Hotel Telephone Charges*, 500 F.2d 86 (1974). There, the Ninth Circuit rejected class certification in a case involving allegations of a nationwide conspiracy among hotel chains to increase room telephone charges. *See id.* at 88. The court reasoned that the fact of injury would require individualized inquiry because each class member would have to prove that he patronized a hotel "while the surcharge was in

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[3] Similarly, all of the district court cases from the Fifth or Eleventh Circuit cited by respondents appear to involve allegations that the defendants either fixed the price or reduced the output of the product that the plaintiffs had purchased. *See* Opp. 14-16.

[4] Respondents additionally cite *In re Plywood Antitrust Litig.*, 655 F.2d 627 (5th Cir. 1981), and *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019 (5th Cir. 1983), as cases in which the Fifth Circuit has "affirmed a classwide verdict in an antitrust class action." Opp. 14. In *Plywood*, however, the defendants did not challenge class certification at all on appeal, and in *Greenhaw*, the defendants challenged class certification only on the ground that the litigation was brought solely for the purpose of obtaining large attorneys' fees. *See* 721 F.2d at 1024.

effect and that he absorbed the cost of the surcharge." *Id.* at 89. To be sure, as respondents point out, *see* Opp. 17, the Ninth Circuit also noted that variations in evidence with respect to the *defendants* precluded class certification. Those variations, however, like the variations in evidence with respect to the *plaintiffs*, related directly to whether any given plaintiff could establish the fact of injury: if a particular defendant could come forward with evidence that the cost of a telephone service charge would have been the same in a competitive market, for example, that evidence would indicate that the relevant plaintiffs had suffered no cognizable injury. *See Hotel*, 500 F.2d at 89. The Ninth Circuit plainly and unconditionally concluded that the fact of injury constituted an "individual question[]" which, in conjunction with other individual questions, precluded class certification. *Id.*[5]

By allowing respondents to proceed with a class action merely by presenting "experts" who assert that the fact of injury can be established on a classwide basis—without, as respondents have recognized, so much as proffering the economic models themselves that would ostensibly be used to do so, *see* Opp. 6—the Third Circuit has deepened a circuit conflict as to whether the fact of injury should be treated as an individual or common issue. The decision below threatens to eviscerate the requirements of Rule 23: if plaintiffs can render an inherently individualized issue "common" simply by introducing an expert report stating that the issue can be proved on a classwide basis, hardly any class will fail the requirements of Rule 23, and the Rule will cease to serve any meaningful gatekeeping function. The Court's review is warranted on this issue of great legal and practical significance.

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[5] The other Ninth Circuit case on which respondents rely, *Blackie v. Barrack*, 524 F.2d 891 (1975), is readily distinguishable. That case was a securities class action, not an antitrust one, and in that discrete context, the Ninth Circuit, like other courts, concluded that causation could essentially be *presumed* on a classwide basis upon a showing of the materiality of the misrepresentations at issue. *See id.* at 906.

II. The Third Circuit Erred, And Deepened A Circuit Conflict, By Holding That Fraudulent Concealment Can Be Established On A Classwide Basis.

Respondents next argue that (1) the "fraudulent concealment issue is not presented in this case," and (2) the Third Circuit's "holding on fraudulent concealment does not create any circuit split." Opp. 19 (capitalization modified). These arguments are not only inconsistent but incorrect.

A. The Fraudulent Concealment Issue Is Squarely Presented Here.

Respondents lead with the implausible argument that the "fraudulent concealment issue is not presented in this case," Opp. 19, even though the Third Circuit squarely addressed that issue, Pet. App. 26a-34a. The gist of respondents' argument appears to be that the fraudulent concealment issue is "not presented" here because it applies to only *some* (but concededly not *all*) of the claims that the Third Circuit allowed respondents to pursue on a classwide basis. That argument makes no sense.

The question presented to the Third Circuit (and now to this Court) is whether the district court erred in certifying classes to pursue claims that concededly would be time-barred but for respondents' reliance on the doctrine of fraudulent concealment. The Third Circuit answered that question in the negative, and allowed respondents to pursue such claims on a classwide basis. Whether respondents can also pursue *other* claims on a classwide basis is wholly irrelevant to that question. Respondents thus err by asserting that "a determination in Petitioners' favor on the issue they raise would not result here in the reversal of class certification," Opp. 19: if petitioners were to prevail on this issue, the Third Circuit's decision would have to be reversed, because the Third Circuit allowed respondents to pursue claims that require them to prove fraudulent concealment on behalf of tens of thousands of absent class members for almost a third of the class period. *Compare* Pet. App. 5a-6a (affirming certification of classes

consisting of persons who purchased corrugated boxes and sheets from petitioners from "October 1, 1993 through November 30, 1995") *with* Opp. 20-21 & nn. 22, 23 (conceding that respondents rely solely on fraudulent concealment to justify all claims prior to May 1994). Contrary to respondents' assertion, this is not a question of "the amount of *damages*" to which each class member might be entitled, Opp. 26 (emphasis added), but a question of petitioners' *liability* to each class member for claims that concededly would be time-barred but for respondents' invocation of fraudulent concealment.

Respondents try to downplay this point by suggesting that the district court itself could always undertake "a modification of the class definition to exclude the earliest purchases." Opp. 20. This suggestion is, to say the least, disingenuous. The Third Circuit *affirmed* the district court's decision to allow respondents to pursue classwide claims based on the earliest purchases; respondents do not suggest any reason why the district court would now turn around and exclude those very claims. If the mere truism that class certification orders always remain open to modification, *see* Fed. R. Civ. P. 23(c)(1), were enough to preclude interlocutory appellate review of certification orders, then Rule 23(f)—which was adopted in 1998 expressly to authorize such review—would be a nullity. Rule 23(f) gives the courts of appeals "a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues," a power "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Rule 23(f) Advisory Committee Note. The Third Circuit recognized that the class certification issues presented here are sufficiently important and far-reaching to warrant Rule 23(f) review, and that court's resolution of those issues in turn is plainly ripe and appropriate for this Court's review.

B. The Decision Below Concededly Deepened A Circuit Split on The Fraudulent Concealment Issue.

Respondents finally argue that "there is no circuit split on the question whether the presence of individualized issues

relating to fraudulent concealment precludes a finding that common issues predominate." Opp. 22 (capitalization modified). That argument would come as a surprise to the Third Circuit itself, which acknowledged a conflict between the First and Fourth Circuits on this point, and expressly aligned itself with the First Circuit. *See* Pet. App. 31a-32a (citing *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), and *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998)). As the Third Circuit explained, *Waste Management* "reject[ed] the rationale in *Broussard*," and held that a plaintiff's reliance on fraudulent concealment presented no bar to class certification. Pet. App. 31a. And the Third Circuit left no doubt about where it came down on this split: "We accept this reasoning [of the First Circuit in *Waste Management*] as more persuasive than that espoused by the Court of Appeals for the Fourth Circuit in *Broussard*." *Id.* at 32a.

Respondents try to deny this circuit split by insisting that *Broussard* was a "highly unusual" case that "did not adopt any *per se* rule prohibiting class certification in the presence of individualized issues concerning the statute of limitations or its tolling." Opp. 23. Respondents are wrong. The Fourth Circuit in *Broussard* specifically held that fraudulent concealment could not established on a classwide basis because it "depends on individualized showings that are non-typical and unique to each [plaintiff]." 155 F.3d at 342. That point, in and of itself, "precluded class certification" in *Broussard*, *id.*, although the Court also held that certification was inappropriate on a variety of other grounds. Respondents thus ultimately fall back on trying to distinguish *Broussard* in a number of ways, all of which are unavailing.

First, respondents assert that *Broussard* "did not even address fraudulent concealment." Opp. 25. But this is just a play on words. The *Broussard* plaintiffs used the label "equitable tolling" rather than "fraudulent concealment" to justify their attempt to pursue otherwise time-barred claims.

Regardless of the label, the plaintiffs in *Broussard* made the same argument as respondents here: that they should be allowed to pursue otherwise time-barred claims because their delay in suing was caused by the defendants' alleged material omissions and/or misrepresentations. *See* 155 F.3d at 342.

Second, respondents argue that *Broussard* "made clear that it was establishing no '*per se* rule,'" because that decision (1) stated that Rule 23 does not "'require that members of the class have *identical factual and legal claims in all respects*,'" and (2) "even left open the possibility of class certification on remand." Opp. 24 (quoting 155 F.3d at 344; emphasis added). These are both *non sequiturs*. There is no legal or logical inconsistency between a rule that the inherently individualized doctrine of fraudulent concealment must be individually litigated and the truism that the claims of class members need not be "identical . . . in all respects" to warrant certification. And by leaving open the possibility of certification of a more limited class on remand, the Fourth Circuit did not remotely suggest that such a class could pursue claims that would be time-barred but for the doctrine of fraudulent concealment.

Third, respondents suggest that *Broussard* must be read in light of "Fourth Circuit caselaw under which class certifications have been upheld despite the presence of individual issues." Opp. 23 (citing *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993)). That suggestion, however, is based on an outright distortion of *Central Wesleyan*, which was authored by none other than Judge Wilkinson, the author of *Broussard*. Although respondents assert that the Fourth Circuit in *Central Wesleyan* "affirmed certification of a class where it recognized that an individual limitations issue was present," Opp. 22, they rely on a section of *Central Wesleyan* that addressed potential *problems* with certification that might eventually require decertification or modification of the class, *see* 6 F.3d at 188-89. *Central Wesleyan*'s recognition that "[d]ifferent time bar defenses," *id.* at 189—if raised at some future point—might undermine certification is entirely

consistent with *Broussard*. Certainly, *Central Wesleyan* provides no support for the Third Circuit's holding that respondents are entitled to represent classes in pursuing claims that would be time-barred but for the doctrine of fraudulent concealment.

Finally, respondents note that "*Broussard* was not even a Rule 23(b)(3) case," because the Fourth Circuit held "that the putative class there could not be certified because of failure to meet the typicality and commonality requirements of Rule 23(a)." Opp. 28. It is not clear what respondents hope to achieve with this argument, since the requirements of Rule 23(a) are "subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions," *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997), so that failure to meet the threshold commonality and typicality requirements of Rule 23(a) *a fortiori* means failure to meet the predominance and superiority requirements of Rule 23(b)(3), *see id.* at 623-24 ("Even if Rule 23(a)'s commonality requirement may be satisfied by [a] shared experience, the predominance criterion is far more demanding."); *cf. Lienhart*, 255 F.3d at 147 ("In *Broussard*, we addressed the predominance, commonality and typicality difficulties that arise under Rule 23 when a myriad of plaintiffs attempt to consolidate legally and factually different claims via the class action device."). Whether analyzed under Rule 23(a) or Rule 23(b)(3), the point remains that the circuits are divided on whether plaintiffs can represent classes in pursuing claims that require them to establish fraudulent concealment, and this Court's review is warranted on that important and recurring issue. *See* Pet. 20-21.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for *certiorari*, this Court should grant the petition.

Respectfully submitted,

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